WORKING GROUP MEETING ON INDIGENOUS LAND TITLE SYSTEMS

FINAL REPORT

First Nations Tax Commission
Commission de la fiscalité des premières nations

Forum of Federations
THE GLOBAL NETWORK ON FEDERALISM

Forum des fédérations
LE RÉSEAU MONDIAL SUR LE FÉDÉRALISME

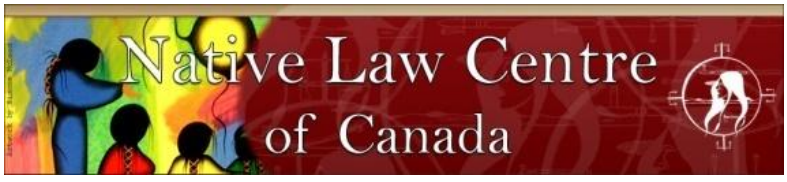

TABLE OF CONTENTS

FINAL REPORT: WORKING GROUP MEETINGS ON INDIGENOUS LAND TITLE SYSTEMS

SECOND INTERNATIONAL SESSION: VANCOUVER, MARCH 3-4, 2009

FINAL REPORT: WORKING GROUP MEETINGS ON INDIGENOUS LAND TITLE SYSTEMS

THIRD INTERNATIONAL SESSION: MONTRÉAL, 9-10 SEPTEMBER, 2009

BACKGROUNDER

LEGISLATIVE DESIGN, INSTITUTIONAL FRAMEWORK AND INTERGOVERNMENTAL MECHANISMS FOR CREATING FIRST NATIONS LAND TITLE CERTAINTY

Recently in Canada, there has been a significant change in legislation and intergovernmental relations between First Nations and all three orders of Government (Federal, Provincial and Municipal). A number of jurisdictions have been transferred to First Nations. Beyond the re-allocation of jurisdiction, new legislation has created a well-defined framework with the construction of four new institutions: The First Nations Tax Commission, the First Nations Financial Management Board, the First Nations Finance Authority and the First Nations Statistical Institute. Another important development was the creation of a First Nations Gazette, launched in 1997, which complements the legal and institutional framework to support, in part, an effective system of self-government.

These were the first steps toward the integration of First Nations into the market economy and into the larger federal scheme. A key challenge for both the federal and First Nations governments is the reduction of barriers to economic development on First Nations lands, increasing investor confidence, and enabling First Nations to be part of their regional economies in a harmonized way with existing provincial and municipal land title systems. Without this harmonization, investors will continue to avoid opportunities in which property rights are unfamiliar and uncertain. For First Nations, promoting sustainable economic development requires a harmonization of property rights between orders of Government, a process that necessitates intergovernmental dialogue and cooperation.

To support this initiative, the Forum and the First Nations Tax Commission propose reaching out to other federal countries in order to learn from their experiences. In the world, and specifically in some federal states, there is an impressive body of experience and reforms that have recently been implemented, or are in the process of being implemented, that could bring inspiration to Canadian efforts.

THE RELEVANCE OF THE FORUM OF FEDERATIONS' INVOLVEMENT

In 2004, the Forum of Federations developed a Strategic Plan in order to implement a coherent planning process and achieve its long-term vision. As one of its five Strategic Objectives, the Forum made the following commitment: *The organization will provide a forum for exploring the possibilities of federalism in addressing governance issues relating to Indigenous People.*

In the past, the Forum implemented two activities where Indigenous Peoples and government representatives of 5 federal countries (Canada, United States, Mexico, Brazil and Australia) plus New Zealand, shared initiatives in the areas of fiscal federalism and institution building. One event was organized in Vancouver, Canada, and the other took place in Oaxaca, Mexico. For each of these events, the Forum was supported and accompanied by the Department of Indian and Northern Affairs Canada.

On the 10th of March, 2008, the Forum and the First Nations Tax Commission initiated one Working Session, which aimed at comparing international expertise on very specific set of challenges linked to Land Title reform mainly across federal States. This Working Session took place in Vancouver and hosted experts from Canada, Australia, South Africa and Peru.

Through these three events, the Forum has developed a good network of governmental and independent experts on the matter of Indigenous Affairs. Moreover, the Forum staff has been guided and supported by its former First Nations representative of the Forum's Board of Directors, C.T. (Manny) Jules. Mr. Jules was the driving force behind the *First Nations Fiscal and Statistical Management Act* (2005), which subsequently created the First Nations Tax Commission.

BRIEF DESCRIPTION OF THE PROGRAM

As a world leader in its efforts to better integrate indigenous governments within the federal scheme, Canada has been exploring various avenues to address the unique aspirations of First Nations and opted to initiate a legislative process that now provides fiscal powers to indigenous peoples, with respect to their lands. This initiative has led to a clearer specification of tax powers, authorities and rights among the various orders of Government. Additionally, it has created an understanding of how accommodation of indigenous aspirations within a federal regime can produce and improve political climate and actually empower indigenous peoples.

The first objective of this program was to explore and assess options for developing a model indigenous land title system within the Canadian federation that:

1. Is harmonized with other orders of Government.
2. Enhances economic opportunities for indigenous populations.
3. Provides a potential model to other federations

The second step that has been explored consisted in formalizing and harmonizing land tenure on reserves. Research has shown that the existing systems of land tenure do not provide property rights with the characteristics that

support an efficient local government and access to credit for developmental purposes. The benefits of an appropriately transformed tenure land system include, amongst others, the following:

- Asserting First Nations jurisdiction would remove the barriers for developing a market based economy.
- It would provide legal certainty that supports normal economic and business practices.
- It would support the reduction of socio-economic disparities within the federation.
- It would allow First Nations to develop a host of policies related to land use and disposition of the land.
- It would create a platform that could remove some of the issues raised by settling claims or expediting additions to reserves.
- It would support the general goal of improving First Nations governance and cooperation among governments.
- Finally, it would showcase the success of the Canadian federation in accommodating these rights without compromising the principles of the federation.

The idea was to proceed in several stages. During the previous 18 months, the program has unfolded as follow:

- **POLICY PAPERS**

Internationally recognized experts on the issue of land titling in multilayered countries have been contracted to develop policy papers underlining best practices, commenting on the current design efforts in Canada and suggesting specific policy issues related to the legislative proposal. The First Nations Tax Commission has commissioned three research papers to examine several dimensions of the First Nations land title initiative in Canada. The papers have looked at the following:

1. Whether federal legislation can achieve the goal of a First Nation land title system
2. The provincial implications of a First Nation land title system
3. The projected transaction costs related to land titling

- **FIRST EXPERT AND SECOND ADVICE SESSION – CALGARY, FEBRUARY 23-24, AND VANCOUVER MARCH 2-3, 2009.**

The first experts' advice session provided an opportunity for international experts to come together to review the Canadian policy papers and become more

familiar with Canada's indigenous land title system legislative proposal. This meeting formed the core network of experts and practitioners of the land title program. It constitutes the first phase of the larger 18 months program which aimed at getting international expertise, specifically on Canada's indigenous land title system legislative proposal.

The second experts' advice session was an opportunity to share experiences and stimulate discussions on how a land title system can be better conceived to support economic development and how it can increase own-source revenues of First Nations governments and Aboriginal people as a whole.

- **THIRD EXPERTS' ADVICE SESSION, MONTRÉAL, SEPTEMBER 9-10, 2009.**

The third session once more brought together international experts, with the objective of reviewing and commenting on the Government of Canada's draft legislation. These discussions also built on prior exchanges at the first and second meetings of experts, and ongoing communication through the Share Point site.

- **DIALOGUE GROUP SHARE POINT SITE**

To enhance the program's efficiency, a Share Point has been established to support the experts and the proponents. It has allowed each participant to access all the policy papers and facilitate discussion among experts and proponents.

- **PUBLICATION**

A publication presenting different Land Title Regimes in the United States, Peru, Australia, Canada and South Africa and the lessons learned by the experts from the respective participating countries about the Canadian experience, is currently on progress.

First Nations Land Title Systems:
Major Program Outcomes of Meetings

The previous 18 months of program activities and international sessions have created a strong cohesion among experts and drafters and allowed them to build a solid body of knowledge from each country and region. Moreover, important program outputs resulted from these meetings.

The first one was the signing, over the course of the summer, of a Memorandum of Understanding between the First Nations Tax Commission and the Institute for Liberty and Democracy (Hernando De Soto's Institute). These two organizations have committed to work together in the coming months to achieve a common goal: To better insert Indigenous Peoples into the market economy.

As an initial step toward the realization of the MOU, the Institute for Liberty and Democracy has requested that the First Nations Tax Commission and the Forum support the work that is done by the Institute and the Commission on Legal Empowerment of the Poor (CLEP), co-chaired by Mrs. Madeleine Albright and Hernando De Soto.

A mission to Lima, Peru, has been organized for 2010 for the First Nations Tax Commission and the Forum. Its objective is to meet with the UNDP Commission. Dr. Manny (C.T.) Jules, Chief Commissioner, Dr. Céline Auclair, Commissioner and Dr. Le Dressay, chief economist working on the development of the *First Nations Proprietary Ownership Act* will be meeting with Mr. De Soto and Mrs. Madeleine Albright.

Secondly, given the real prospect that the Government would support the legislation on land title systems and given the contribution the Commission and the Forum have made by rendering accessible international experts, the Department of Indian Affairs has mandated a former Assistant Deputy Minister to work with the team ensuring the success of the initiative.

Thirdly, the Forum of Federations has been asked to join a coalition of organizations and countries committed to providing access to property rights in Latin America. This coalition will be lead by UN Commission on Legal Empowerment of the Poor and the Institute for Liberty and Democracy.

Finally, some discussions are ongoing presently with Australia and South Africa regarding the possibility for the Forum to support similar projects in these respective countries.

Participants

TERRY L. ANDERSON

EXECUTIVE DIRECTOR
PROPERTY AND ENVIRONMENT RESEARCH CENTER
UNITED STATES

Terry Anderson has been director of the Property and Environment Research Center since 1995. He was a Professor of Economics at Montana State University from 1972 to 1998 and is now Professor. Since 1998, Professor Anderson has been a senior fellow at the Hoover Institution, Stanford University. Mr. Anderson's research helped launch the idea of free market environmentalism and prompted public debate over the role of government in managing resources. He has published widely in both professional journals and the popular press. Professor Anderson has been a visiting scholar at Oxford University, the University of Basel, Clemson University, and Cornell University Law School. He received his Ph.D. in economics from the University of Washington in 1972 and was awarded a Fulbright Research Fellowship to Canterbury University in 1988.

CÉLINE AUCLAIR

FORMER VICE PRESIDENT
FORUM OF FEDERATIONS
CURRENTLY GENERAL DIRECTOR, POLICY AND STRATEGIC DIRECTION
DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA
AND COMMISSIONER AT *THE FIRST NATIONS TAX COMMISSION*

Céline Auclair is a founding member of the Forum of Federations. She was Vice-President of the Forum from 1998 until 2009. She is currently General Director for Policy and Strategic Direction at the Department of Indian and Northern Affairs Canada. Dr. Auclair holds a Ph.D in International Studies from the Graduate Institute of International and Development Studies, Geneva. Dr. Auclair's extensive background includes a contribution to the creation of a Property Commission and Human Rights Institutions in Bosnia Herzegovina. She has also worked, both domestically and abroad, in international development, socio-economic development, First Nations taxation, as well as good governance practices.

DIANE CRAGG

LAND AND GOVERNANCE CONSULTANT
REGISTRAR OF LAND TITILES FOR NISGA'A LISIMS GOVERNMENT
CANADA

Diane Cragg serves in a consulting capacity to First Nations, government and private sector clients. Her areas of expertise include establishing and implementing of post-treaty land title and land management processes and undertaking governance reviews and initiatives, particularly in the First Nations context. Diane holds a statutory appointment as the Registrar of Land Titles for the Nisga'a Nation Land Title Office, presiding over the only Torrens Title system operated by an aboriginal government in North America. Diane holds a Bachelor of Arts degree in Geography, a Master of Arts degree in Conflict Analysis and Management, and is certified in conflict resolution by the Justice Institute of British Columbia. She is an adopted member of the Lax Gibuu (Wolf) Tribe of the Nisga'a Nation.

MARIA ANTONIETA DELGADO

CHIEF OF INTERNATIONAL MISSION
GERMAN COOPERATION FOR INTERNATIONAL DEVELOPMENT
GTZ AND EUROPEAN COMMISSION
PERU

María Antonieta Delgado is an attorney, associate Professor of International Private Law, Conciliator and Arbitrator. She leads the international technical assistance of the justice reform project of the European Commission in Peru. She has more than twenty years of experience in managing and co-managing politically sensitive programs and projects under grant agreements and cooperative agreements with NGOs, private organizations and governmental organizations, aimed at strengthening the rule of law and good governance, capacity building, citizens´ participation, human rights, access to justice, alternative dispute resolution mechanisms, property rights and the reform and improvement of the system of justice in Peru and the Andean region. She has written several research papers, articles and books on these issues and on matters related to private international law.

MARÍA DEL CARMEN DELGADO

LEGAL MANAGER
INSTITUTO LIBERDAD Y DEMOCRACIA
PERU

Maria del Carmen Delgado is Legal Manager at the Institute for Liberty and Democracy (ILD). She is also Attorney and Associate Professor of Civil Law and Arbitrator at the Faculty of Law and the Conciliation and Arbitration Center of the Pontifical Catholic University of Peru. Mrs. Delgado is a specialist in property rights issues; she has managed national and international programs, trained legal reform designed teams and designed institutional reforms for the capitalization of real estate and business assets. She has written several research papers on these issues and has represented the ILD in various national and international forums. Mrs. Delgado has been Vice President of the Board of Directors at the new Real Estate Registry created at the beginning of the 1990´s. She was responsible for leading the property reform design process in Peru, setting up and managing the new Real Estate Registry, and issuing internal regulations to guide formalization and registration activities. She was also involved in the process for building consensus to facilitate the approval of the legal reform package, as well as in the implementation of the property formalization program. She has been Board Member of Lima´s Bar Association, as well as member of various executive and advisory commissions at the same bar on subjects such as property formalization law, registration law and private international law.

THOMAS EUGENE FLANAGAN

PROFESSOR
UNIVERSITY OF CALGARY
CANADA

Dr. Flanagan studied political science at Notre-Dame University, the Free University of West Berlin, and Duke University, where he received his Ph.D. He has taught political science at the University of Calgary since 1968. Although Dr. Flanagan has published in several areas, including books on Louis Riel, the North-West Rebellion, and aboriginal land claims, he has served as a consultant and expert witness for the Crown in aboriginal and treaty-rights cases such as Dumont, Blais, Benoit, and Victor Buffalo. Dr. Flanagan was elected to the Royal Society of Canada in 1996. He worked as Senior Communications Adviser during the Conservative Party's successful 2005-06 election campaign. He now teaches at the University of Calgary.

MR. WAYNE HAIMILA
LEGAL ADVISOR
FIRST NATIONS TAX COMMISSION
CANADA

Wayne Haimila was Senior Council/Advisor. He provided advice respecting legal and policy issues to the Chairman and members of the ITAB on Indian Act (Section 83) property taxation issues, initiatives and strategies. He has been a participant in the conception and development of the First Nations Fiscal and Statistical Management Act, regulations and standards. A graduate in law (UBC '79), Mr. Haimila had more than twenty-five years of experience in First Nations issues at the local, regional and national levels. Mr. Haimila passed away in 2010. He is terribly mist by the members of the expert team.

NAWEL HAMIDI
CONSULTANT
FORUM OF FEDERATIONS
CANADA

Nawel Hamidi is a lawyer. She has been a consultant for the Forum of Federations for 5 years. She has participated to the drafting process of the Iraqi Constitution and has been advisor on legislative projects for some of the members of the Commonwealth. She is also a facilitator at the Pearson Peace-Keeping Center on subjects such as international law, gender issues and cross-cultural relations. She holds a Master in religious law and interreligious dialogue.

JAMES (S'AK'EJ) YOUNGBLOOD HENDERSON

PROFESSOR AND RESEARCH DIRECTOR
NATIVE LAW CENTRE OF CANADA
CANADA

James S'ak'ej Youngblood Henderson is Professor and Research Director of the Native Law Centre of Canada at the College of Law, University of Saskatchewan. He was born in 1944 to the Bear Clan of the Chicksaw Nation and Cheyenne Tribe of Oklahoma. In 1974, Dr. Henderson received a Juris doctorate in law from Harvard Law School and became a law professor who created litigation strategies to restore Aboriginal Culture, institutions and rights. During the constitutional process (1978-1993) in Canada, he served as a constitutional advisor for the Mikmaw nation and the NIB-Assembly of First Nations. He currently pursues justice for Aboriginal Peoples of Canada through all the international, national and local activities of the Native Law Centre. He has continued to develop his work in aboriginal and treaty rights and treaty federalism in constitutional law. His latest books are *Aboriginal Tenure in the Constitution of Canada (2000)*; *Protecting Indigenous Knowledge and Heritage (2000)* and *Treaty Rights in the Constitution of Canada (2007).* Professor S'ak'ej Henderson is a noted international human rights lawyer and an authority of protecting Indigenous heritage, knowledge, and culture. He has been a member of the Advisory Board to the Minister of Foreign Affairs and is currently a member of the Sectorial Commission on Culture, Communication and Information of the Canadian Commission for UNESCO, and of the Experts Advisory Group on International Cultural Diversity

.

C.T (MANNY) JULES

CHIEF COMMISSIONER
FIRST NATIONS TAX COMMISSION
CANADA

C.T. (Manny) Jules was the driving force behind the *First Nations Fiscal and Statistical Management Act*, passed by Parliament in 2005, creating the First Nations Tax Commission. Mr. Jules led the First Nations amendment to the Indian Act in 1988 so that First Nations could exercise the jurisdiction to levy property taxes on-reserve. The Indian Taxation Advisory Board (ITAB) and the current First Nation property tax system were created as a result of his vision and efforts. Mr. Jules served as Chair of ITAB from 1989 to 2003 and 2005 to 2007. He is a member of the Kamloops Indian Band and served as Chief from 1984 to 2000. Mr. Jules has devoted over 30 years of his life to public service in support of Aboriginal issues. He received an Honorary Doctorate of Laws from the University of British Columbia in 1997 and another from Thompson Rivers University in 2006. In September 2009, Mr. Jules was presented with the Order of British Columbia which is the province's highest honour for outstanding achievement.

ANDRÉ LE DRESSAY

DIRECTOR
FISCAL REALITIES
CANADA

André Le Dressay has been the Director of Fiscal Realities since its incorporation in 1992. He has written numerous academic and consulting reports in his areas of expertise: transaction costs, economic impact assessments, First Nations tax systems, and institutional analysis. He is also the director of the Tulo Centre of Indigenous Economics and an adjunct professor of economics at Thompson Rivers University. He holds a Ph.D. Economics.

GRAHAM MATTHEWS

PARTNER
LANG MICHENER LLP
CANADA

Graham Matthews is a partner in the Vancouver office of Lang Michener LLP, Barristers and Solicitors. His practice is focused on the area of real estate law and secured and unsecured loan transactions. Mr. Matthews's lending work involves advising both institutional and private lenders and borrowers in the financing of a broad range of businesses. He also serves as counsel to insurance companies in providing secured deposit protection insurance contract facilities under the *Real Estate Development and Marketing Act*.

MR. JOHN MCKENNIREY

ASSISTANT DEPUTY MINISTER
LAND AND ECONOMIC DEVELOPMENT
THE DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS
CANADA

John McKennirey was appointed Assistant Deputy Minister of the new Aboriginal Economic Development Branch, effective January 8, 2007. Mr. McKennirey previously served as Assistant Deputy Minister of Labour and Head of the Federal Mediation and Conciliation Service at Human Resources and Social Development Canada. He has occupied various positions in Foreign Affairs and International Trade Canada and the Canada Revenue Agency. He was also the first Director of the Indian Taxation Secretariat at INAC. He holds a BA from Brock University and an MA from the University of Ottawa. He has also pursued graduate studies at the University of Louvain in Belgium and McMaster University.

BRENT MOREAU

DIRECTOR OF INTERGOVERNMENTAL AFFAIRS
FIRST NATIONS TAX COMMISSION
CANADA

Brent Moreau joined the FNTC's predecessor (ITAB) in 1991 and, since 1998, has been the Director of Intergovernmental Affairs. As such, he is responsible for the activities of FNTC's office in the National Capital Region, which includes the Commission's wide-ranging relationship with the Federal Government, the development, review and approval of First Nation taxation by-laws under section 83 of the Indian Act, and the Commission's communications program. Mr. Moreau has a degree in Political Science from Carleton University (1989) and is a member of the Mohawks of the Bay of Quinte. He grew up in the nearby city of Belleville, Ontario.

NICHOLAS OLIVIER

PROFESSOR AND DIRECTOR
SDAC CENTRE FOR LAND-RELATED, REGIONAL AND DEVELOPMENT LAW AND POLICY (CLRDP)
UNIVERSITY OF PRETORIA
SOUTH AFRICA

Nic Olivier has more than twenty-five years of experience in higher education and government administration. He has managed and co-managed a significant number of both governance-related and academic programs including many transformative national - and African - programs (notably the South African National White Paper Program on Traditional Leadership and other Traditional Institutions in South Africa, the National Policy Research Program on Vulnerable Communities in South Africa, and recently, the 2007-2010 National Sustainable Restitution Support (South Africa) Program as well as a number of various other national programs for the South African, Malawian and Southern Sudan Governments). His areas of expertise are in governance and development, including, amongst others, intergovernmental relations between orders of government and between government and traditional institutions. Dr. Olivier also has extensive experience in strategic planning and management, policy analysis, co-ordination of extensive rural development programs, land reform, human rights, legal pluralism, and monitoring and evaluation. He has also published widely in academic journals and has contributed to a number of text-books. In addition to a number of undergraduate and two Honors degrees, as well as a Masters degree, he holds two doctorates in Law (LL.D. at the University of Leiden and LL.D. at the University of Pretoria).

DOMINIC P. PARKER
ASSISTANT PROFESSOR OF ECONOMICS
MONTANA STATE UNIVERSITY
UNITED STATES

Dominic (Nick) Parker joined the Economics faculty at Montana State University as an Assistant Professor in August 2009, and has been a Senior Research Fellow at the Property & Environment Research Center since 2005. Parker's research focuses on how different property rights and institutional arrangements affect natural resource use and economic development. He addresses some of these issues in the context of American Indian reservations. In particular, he has conducted an empirical investigation of the link between access to credit and tribal sovereignty on reservations. Looking forward, Dr. Parker has a keen interest in learning more about how different legal and political institutions on Indigenous lands affect access to credit, entrepreneurship, and investment in human and physical capital.

GREGORY RICHARD
CHIEF ECONOMIST
FISCAL REALITIES
CANADA

Greg has over 11 years experience with government working in economic development, intergovernmental liaison and fiscal relations. He is thoroughly familiar with government policies and decision-making. He has worked extensively in public finance, facilitating investment projects, the economics of innovation and intergovernmental liaison. He holds an M.A. in Applied Economics.

KEN SCOPICK

CHIEF OPERATING OFFICER
FIRST NATIONS TAX COMMISSION
CANADA

Ken Scopick is the Chief Operating Officer of the First Nation Tax Commission. Mr. Scopick has extensive experience in the planning, financing and project management of capital infrastructure projects and in the land leasing and creation of major developments on First Nation lands. Ken played a coordinating role in the development of the First Nations Fiscal and Statistical Management Act (FMSA) and in the implementation of the fiscal institutions. He is responsible for leading interest based negotiations with respect to taxation and facilitates dispute resolution between First Nations and their taxpayers and First Nations and local governments. Mr. Scopick has worked with the Chief Commissioner of the FNTC as a senior policy advisor, financial manager and executive officer since the inception of the Indian Taxation Advisory Board.

ANN SHAW

COMMISSIONER
FIRST NATIONS TAX COMMISSION
CANADA

Mrs. Shaw is a fluently bilingual, tax lawyer from Québec. Her extensive background and work experience includes representing and advising clients on real property and other taxation matters (including litigation before various tribunals), land development and preservation issues. Mrs. Shaw also has broad negotiation experience with all levels of Federal, Provincial and Municipal Governments. Since 2007, Mrs. Shaw has served as a Commissioner for the First Nations Tax Commission.

SARAH SMITH
PHD CANDIDATE
DEPARTMENT OF LITERATURE AND MODERN LANGUAGES
UNIVERSITÉ DE MONTRÉAL
CANADA

Ms. Sara Smith is a PhD candidate in Hispanic Literature at the Université de Montréal. Sara completed her undergraduate studies at the University of Victoria (2001) and an M.A. at the Université de Montréal (2005). Currently she is working on her PhD dissertation under the supervision of Andean sociolinguist, Dr. Juan Carlos Godenzzi. Her research focuses on Aboriginal and non-Aboriginal relations and public-institutional discursive practices in Chile and Canada, and the way the latter projects cultural values and norms onto land. In 2007, she was awarded the Joseph-Armand Bombardier Scholarship by the Social Sciences and Humanities Research Council of Canada (SSHRC). In 2009, she was awarded a scholarship by the Centre de Recherche en Étique de l'Université de Montréal (CREUM) for which she participated in several round table discussions. Sara is from Kamloops, British Columbia.

STUART (BUD) SMITH
LAWYER AND PRESIDENT
MEJIA PROPERTY INC.
CANADA

Mr. Smith, QC, is a businessman and former practising lawyer who served in public office as MLA for Kamloops as Regional Economic Development Minister and as Attorney General of British Columbia. He was Principal Secretary to the Premier of British Columbia (1983-1986). He was MLA for Kamloops (1986-1991) and a Cabinet Minister (1988-1991). Mr Smith is currently president of Mejia Property Inc. and YKA Travel wise Kamloops Ltd., Chairman of Christopher James gold Corp., and director of Urban Systems Ltd. He has served as a Director of the BC Development Corporation, Canada Post Corporation, and several private-sector reporting companies.

MAUREEN F. TEHAN
ASSOCIATE PROFESSOR
ASSOCIATE DEAN
THE MELBOURNE LAW SCHOOL
UNIVERSITY OF MELBOURNE
AUSTRALIA

Maureen Tehan is a Barrister and an Associate Professor at the University of Melbourne. She researches and teaches in the fields of property and Indigenous peoples legal issues including Indigenous land tenure and land management systems, protection of Indigenous cultural heritage, Indigenous people and their links with natural resources law, land and environmental management , negotiation and agreement making with indigenous peoples and property theory. She has published widely in these areas. Most recently she has jointly edited *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge 2010) in which she also has two chapters on land titling reform. She has received numerous Australian Research Council grants, primarily in relation to indigenous peoples and negotiation and agreement making for land tenure and resource management and currently holds a grant with other researchers focusing specifically on Indigenous economic empowerment. The ATNS database of agreements is a major aspect of these projects. Prior to her appointment at the University of Melbourne in 1994, she was principle lawyer for the Pitjantjatjara, Ngaanyatjarra and Yankunytjatjara peoples in central Australia for almost ten years and she continues as a legal advisor and consultant to indigenous organizations.

WORKING GROUP MEETING ON INDIGENOUS LAND TITLE SYSTEMS

FINAL REPORT

CALGARY, FEBRUARY 23-24, 2009

EXECUTIVE SUMMARY:
FIRST EXPERTS' ADVICE SESSION

The first experts' advice session provided an opportunity for international experts to come together to review the Canadian policy papers and become more familiar with Canada's indigenous land title system legislative proposal. It was also an opportunity to share international experiences and stimulate discussions on how a land title system can be better conceived to support economic development and how it can increase own-source revenues of First Nations governments and Aboriginal people as a whole.

Land is one of the most important natural resources that any country possesses. It is further a core element to First Nations culture, cosmogony and sustainability. For these reasons, there is a pressing need to manage land, effectively value it and consistently monitor its use, so that the value of this asset may be enhanced to the benefit of all members of the Canadian society.[1]

Discussions during the first session focused on principal mechanisms by which First Nations Land Systems can help foster a better business environment on First Nations' Lands in Canada. Studies have determined that the existing market contrasts in development on different sides of reserve boundaries.

These studies came to the conclusion that market conditions were not the cause of under development of lands on reserves, but rather it was a sign of market failure. Market failure happens when economic development stages are affected as a whole. Another conclusion proposes that proper First Nations land title system could be an important element in making development steps work properly.

This is the reason why a new legislative framework to create a land title system on aboriginal lands has been initiated. This legislation will be federal and would provide First Nations with the option of applying a modified Torrens land title system to their lands. It would also provide for the creation of a fee simple title originally held by the First Nation or its members, which could subsequently, be transferred to First Nations members or non-First Nations members.

This legislation would remove the restrictions on mortgaging, seizure and ownership, create an inalienable reversionary right (similar to an escheatment right) in favor of the First Nation and protect First Nations existing and changing jurisdiction over their lands. The legislation also aims to eliminate the separation between legal and beneficial ownership of the land; permitting transferability of freehold interests and opening possibilities for accessing equity in lands.

[1] United Nations "Land Administration Guidelines with Special Reference to Countries in Transition" (1996) Economic Commission for Europe: New York and Geneva quoted in Lang Michener LLP., "Best Practices un First Nations' Land Administration Systems", 2008.

Dialogue during this session also explored different economic and legal realities related to land management in Latin America and aboriginal lands in Australia.

Real estate assets in Latin America are subject to many obstacles (lack of legal mechanism to recognize interests, cumbersome and costly procedures to formalize property rights in urban and rural areas) which prevent the capitalization of real estate property rights. Some main reforms touching the elaboration of effective, secure, unified and accessible land registration systems are currently under analysis. The Peruvian New Real Estate Registry, the *Registro Predial* is an example.

The Australian *Aboriginal Land Rights (Northern Territory) Act 1976* allows indigenous communities to initiate processes to recover their land through Land Councils and manage all resources that emanate from these lands. It recognizes also the aboriginal system of land ownership and integrates the concept by means of an inalienable freehold title. However, the *Act* does not provide for mortgaging or selling of lands. Some recent changes to the *Act* introduced the leasing and sub-leasing of aboriginal lands.[2]

[2] The experiences of United States and South Africa will be discussed at the next session in Vancouver, March 2-3, 2009.

ADDRESS BY CHIEF COMMISSIONER CLARENCE T. MANNY JULES

CALGARY, FEBRUARY 23, 2009
VANCOUVER, MARCH 2, 2009
MONTRÉAL, SEPTEMBER 9, 2009

We have been working hard to get representatives from different countries, Australia, South Africa, United States, and from the Institute on Liberty and Democracy to work with our national experts on First Nations land title systems. This is a project of national and international interest to demonstrate how indigenous populations can be brought into federations and become participants in the global economy. I believe in federalism and I believe that we are part of a federation. This project will create an institutional framework so First Nations can move away from the Indian Act *and become true partners in Canada. The* Indian Act *effectively legislated us out of the economy and federation. Our land title proposal is part of an agenda to legislate our way back in.*

I recognize that there is a fear among First Nations as to what will happen after the Indian Act*. Over the years, I have witnessed many discussions on this issue, and the question often raised was how to get control over our destinies. My father taught me that to control our political destiny we need to be part of the economy. He taught me the values of responsibility and independence. He taught me that once we develop our economies, we can generate tax revenues and rebuild our social infrastructure.*

I remember in 1975 when I attended a meeting in Chilliwack to reject government funds. I remember that despite the voices of caution at that meeting that we tried and ultimately failed in our attempt to reject government funding. I remember my father's comments during the 1968 consultations during the White Paper consultation process to abolish the Indian Act*. He said that we need to move decision making power to us and away from bureaucrats. He said we needed to make decisions at the speed of business and not the speed of government.*

I have spent the better part of my adult life implementing my father's vision. We enabled First Nation tax jurisdiction in 1988 and created the institutional framework to support it. We began collecting sales taxes in 1998. In 2005 we created the first national indigenous institution in the world that approves First Nation laws within a federation. Our own land title system is the next step in my father's vision to rebuild our economies and establish our place in this federation.

I have always believed that there are two great questions that the Canadian federation must answer. What is the place of Quebec in this country and what is the place of our indigenous populations? The second question is common to many countries in the world – some of whom are represented at this meeting. Our land title proposal is an important answer to the second question and a potential model for other countries.

I have a vision of our future, and in my view, the Indian Act *has no place in it. I see a future where we will be able to participate fully in the market economy. I see a future where there is no Department of Indian Affairs. They have been replaced by our national institutions that support our governments with model laws, administrative systems and training. I see a future where we don't have a deeds registry system. It has been replaced by a First Nation land title system that protects underlying First Nation title and allows us to provide guaranteed title to individuals.*

To realize this vision, we need to work with the world's leading experts. It is an honor and a privilege to listen to your ideas to help us. I know we will learn from each other. I thank you for supporting us in our agenda and I know that in the words of my ancestors that working together we will make each other good and great.

TRANSACTION COSTS FOR LANDS TITLE SYSTEMS AND INFORMATION

DR. ANDRÉ LE DRESSAY
DIRECTOR
&
MR. GREGORY RICHARD
CHIEF ECONOMIST

FISCAL REALITIES
CANADA

CALGARY, FEBRUARY 23, 2009
VANCOUVER, MARCH 2, 2009

The objective of this study is to identify mechanisms by which First Nations land title systems can help foster a better business environment on First Nations' Lands. Thus, a proper land title system would allow participating First Nations to

a) significantly reduce the time, professional costs and risk associated with property transactions on First Nation lands;
b) reduce the need for a First Nation to develop unique arrangements to support private land tenure;
c) improve the efficiency of government services in support of land transactions and the conduct of business;
d) improve infrastructure planning and development;
e) create a more secure environment for contractors and developers working on reserves; and
f) improve access to credit for First Nation persons, corporations and governments.

The presentation starts with important and fundamental economic premises[3]: First, the only fiscally sustainable way to solve First Nations long term poverty is with long term sustainable economic growth. Second, sustainable growth

[3] This presentation is a résumé of a discussion paper prepared by Fiscal Realities entitled: *Making Market Work on First Nations Lands: The Role of Land Title in Reducing Transaction Costs – Discussion paper*, 2009, available on the Dialogue Group Share Point website. There will also be a final draft of this discussion paper to be developed by April 2009 and which will be shared with the expert panel via the Dialogue Group Share Point website.

requires a competitive private sector. Third, a competitive private sector requires two important things: A regulatory framework and secure property rights on First Nation lands.

HIGH COSTS OF DOING BUSINESS ON FIRST NATIONS LANDS

The research agenda began in 1996, when the contrast in levels of development between the Kamloops First Nation and the City of Kamloops, and also the Tzeachten First Nation and the City of Chilliwack were noticed. There are marked contrasts in development on different sides of reserve boundaries. The study came to the conclusion that market conditions were not the cause of this under development, but that it was rather a sign of market failure.

Other case studies were conducted in 1998 and 1999 that looked into the time required to secure a property right and navigate approval processes for major projects on different First Nations sites (Squamish, Kamploops, Uashat mak Malio-Utenam and Siksika) versus similar projects in adjacent non-First Nations Lands (Calgary, Vancouver and the City of Kamloops). Processes were mapped out and the time to complete the transactions was measured. Results showed evidence of significant market failure on First Nations lands. Typically, it took four to six times longer to reach the construction stage of a project on First Nations lands. Moreover, these were the First Nations with the most development experience and hence likely had the fastest process.

INTERVENTION: There is another side to this: It is not only the value of land base on the certainty of titles and regulation (that would be the sign of market failure), it is rather the non-land cost opportunity on First Nations lands to build the same bureaucracy to develop land. If we have a look at other neighboring non-first Nations lands, at the developing cost regime, at the inspection regime, at the competition between the engineering department and the planning department, etc. in the municipal infrastructure, all these aspects create significant additional costs. If wisdom is used in developing First Nations land, there will be a way to make them a preferred development place. Therefore, instead of discussing low cost, it is better to speak about high value because at the end, stakeholders will be looking for quality.

THE MISSING INSTITUTIONAL FRAMEWORK

Simplified development process on First Nations Reserves and outside First Nations Reserves are the following: Project initiation, securing land tenure, financing, infrastructure development and services, local and legal framework for markets, construction and the selling or leasing of the project itself. The research came to the conclusion that the whole development process is affected on First Nation lands and that a First Nations land title system could be an important

element in making these development steps work properly. Ideally, the costs of investment facilitation should be as low as they are on non-First Nations lands.

The Land Registry System on First Nations lands is a Deeds registry system. This registry has a heavy access procedure which involves getting in touch with an officer in the Department of Indian Affairs, and then obtaining a password to access the registry. It only registers land parcels that are on First Nations lands and it does not offer any guarantee that all the descriptive documents are registered, accurate and exhaustive. From the point of view of an investor, it is very difficult to examine precisely all the history related to the land and yet this is necessary to understand the parameters of any interests in the land. Usually, considerable legal expertise is required to help the stakeholder excerpt the needed documents and understand the information.

The British Columbia land title system is integrated within the government legislative framework and economy. Its intent is to help reduce costs related to land transactions. The British Columbia land title system is used to register and guarantee title to real property, but it is also used by numerous other statutes for various functions including providing notice, enforcing or implementing statutory provisions, providing security or insuring payment of financial obligations.

PRELIMINARY OBSERVATIONS ABOUT TRANSACTION COSTS AND LAND TITLE SYSTEMS

The premise of this research is that a proper First Nation land title system could significantly improve the business climate on First Nation lands. It would do so through three distinct, but related, transmission mechanisms. First, it would lower transaction costs related to land development. Second, it would promote service efficiencies in the public sector, many of which would create a better climate for the conduct of business. Third, it would improve access to credit for First Nations people, corporations and governments.

- **OBSERVATION 1**

There are 50 separate pieces of legislation that facilitate a charge in the BC land title system and no piece of legislation that facilitates a charge in the Indian Land Registry System.

- **OBSERVATION 2**

The costs of using the Indian Land Registry System (ILRS), the First Nation Lands Register System (FNLRS), and the Self Government First Nations Lands Registry (SGFNLR) are lower than the costs of using the BC land title system or the Ontario System (Polaris).

- **OBSERVATION 3**

Registry systems that allow search via civic addresses are easier to use. Both the BCLTS and POLARIS systems allow searching by civic addresses. The ILRS does not. As to why civic addresses are not used in the ILRS, registry staff stated that this was because "addresses change a lot". ILRS also required exact search terms to return results for some fields.

- **OBSERVATION 4**

Title systems are easier to search than registry system. This observation has been made in other research but it is worth repeating that guaranteed title systems allow a user to rely on the information contained in the registry without having to review the original documents as is the case for the ILRS, FNLRS, and SGFNLR.

- **OBSERVATION 5**

The BC land title system is electronically linked to sites that help reduce search and transaction cost and the ILRS, FNLRS, SGFNLR are not. Notably, in addition to providing land title information, BC Online links with other electronic land information services.

PRELIMINARY SURVEY OBSERVATIONS

The next 6 observations are based on a sample of 90 properties selected from the three types of registries on reserves (ILRS, FNLRS and SGFNLR) and 60 properties selected from the BC land title system.

A representative reserve was selected from within each of the three on reserve registry systems: Kamloops #1 from the Indian Lands Registry, Tzeachten #13 from the First Nation Land Register, and Tsinstikeptum #9 from the Self Government First Nations Lands Registry. Properties on higher end residential developments that have been built within the last 20 years were selected from these communities since these properties are most comparable to similar off reserve properties (in many cases their values are as high or higher than those of comparable off reserve properties). Thirty residential properties that meet this criterion within each Reserve were randomly selected. The land registry document was searched and parcel abstracts were obtained for each property within the three random samples.

A nearby off reserve comparison city was selected for each of the representative reserves: The City of Kamloops, the City of Chilliwack, and the City of Kelowna. Thirty residential properties were randomly selected in each of the three comparison cities. To date, title has been searched and title documents have

been obtained for the random samples within both the City of Kamloops, and the City of Kelowna, but not the City of Chilliwack.

- **OBSERVATION 6**

No statutory rights of way in favor of utilities are registered on the 90 properties examined in the on reserve systems. There are 44 statutory rights of way in favor of utilities registered on the 60 titles examined in the provincial system.

- **OBSERVATION 7**

Not one statutory right of way in favor of a local government was found on the 90 properties from the three on reserve systems. However, there are 13 statutory rights of way in favor of the City on the 60 titles examined in the provincial system.

- **OBSERVATION 8**

Not a single property in the three on reserve systems has registered undersurface rights. The provincial crown is the holder of undersurface rights on 34 of the 60 titles looked at in the provincial system.

- **OBSERVATION 9**

No environmental conservation covenants are registered on the 90 properties in the three on reserve systems, while 17 such covenants are registered on the 60 randomly selected titles in the provincial system.

- **OBSERVATION 10**

No covenant in favor of the local government is registered on the 90 properties examined in the three on reserve systems. The City of Kamloops is the holder of 66 covenants registered on the 30 titles examined from that city, while the City of Kelowna is the holder of 53 covenants registered on the 30 titles examined from that city.

- **OBSERVATION 11**

There are 48 current (non-discharged) mortgages registered on the 90 on reserve properties. There are 62 mortgages registered against the 60 titles in the provincial system.

INNOVATION AND INTEGRATION: FIRST NATIONS LAND TITLE SYSTEMS IN THE CANADIAN FEDERATION

MR. GRAHAM MATTHEWS
PARTNER
LANG MICHENER LLP
CANADA

CALGARY, FEBRUARY 23, 2009
VANCOUVER, MARCH 2, 2009

A review of the land tenure system in First Nations communities and a brief overview of the work the First Nations Tax Commission has been doing to create a best practices land title system to replace the current system was discussed. The presentation began by providing a brief history of Canada and its constitutional framework.

1. BRIEF HISTORY OF CANADA: THE CONSTITUTIONAL FRAMEWORK

In order to analyze the possibility of creating a new land title system for First Nation lands in Canada, one must understand the existing, treaty, constitutional and legislative framework that has created the current land tenure regime in First Nations communities.

To understand the Canadian aboriginal treaty policy framework, one must look to the very beginnings of the Canadian federation. Britain had followed a policy of treating with aboriginal groups since the start of its colonial expansion into North America. After the French English War (1754-1763), which happened between France and England and included their colonial territories in North America, the treaty policy of Britain was formally enunciated in the *Royal Proclamation* of 1763. In the *Royal Proclamation*, the Crown recognized aboriginal rights to land and specified that only the Crown could purchase or receive a surrender or transfer of aboriginal interest in land. Any purchase, surrender, or transfer would require a public assembly of the First Nations and representatives of the Crown. Pursuant to this treaty policy, various treaties were signed in respect of much of Canada and their content does not diverge substantially from one to the other.[4]

[4] A majority of treaties proposed almost the same core structure. They included provisions regarding exchange of rights and obligations between the Crown and the First Nations where aboriginals ceded title to their lands and in some cases, saw their hunting and fishing rights

Essentially, the treaties ceded aboriginal lands to the Crown in exchange for certain continuing rights, which included the right to have certain lands set aside for them as reserves.

The structuring of the Canadian federal state also started after the French English War. Following the resolution of this war, the Province of Canada was formed under British rule. Later, pursuant to the *Constitution Act* of 1867, the Province of Canada was divided into two provinces, Ontario and Quebec which united with New Brunswick and Nova Scotia to form the Dominion of Canada. Today, Canada has 10 provinces and 3 territories and they are still partially governed by the *Constitution Act, 1867*.[5] Under the Canadian constitutional framework, the Provinces have legislative jurisdiction regarding property and civil rights, which includes the power to regulate lands and commercial activity generally. Section 91(24) of the same *Act* establishes exclusive legislative authority of the Federal Government over "Indians, and Lands reserved for the Indians". As a result of this division of powers, the provincial framework applicable to lands and land development does not apply to aboriginal lands in Canada.

The other key background framework is the *Indian Act, 1876* which was an exercise of federal jurisdiction over aboriginal land, government and life. The structure of the *Act* has been fundamentally unchanged since 1876 and it did not appear so far to be effective in regulating First Nations economic interests and has caused significant issues.

1.1 THE INDIAN ACT: LAND TENURE REGIME FRAMEWORK

The Indian Act creates the land tenure regime applicable to aboriginal lands in Canada. Under the *Indian Act,* aboriginal lands are held by the Crown for the use and benefit of aboriginals. The *Act* specifies that aboriginals are entitled to hold Certificates of Possession (CPs) but that no freehold interests are permitted. They may transfer the CPs to other aboriginals, but not to non-aboriginals who may hold leases only. This has the impact of limiting considerably the marketable interest in reserve land and discounting the values of those interests.

---

recognized by the Crown, and where the Crown set aside some reserves lands for First Nations. Various other material, goods and covenants were also provided by the Crown.

[5] Further to this, other provinces joined the Federation at different historical times and following different memoranda of understanding in term of their union with Canada. Certain obligations were created also with respect to title and lands in Canada. *The Indian Act,* consolidated in1876, also integrated many aspects touching lands and its administration on First Nations reserves. In 1870, Canada acquired the Northwest Territories and the province of Manitoba which became the 5th Province; 1871, British Columbia (6th province); 1873, Prince Edward Island (7th Province); 1895, Northwest Territories are expanded; 1898, Yukon became the second Territory; 1905, Alberta and Saskatchewan (8th and 9th Provinces); 1912, Ontario and Manitoba attained their actual boundaries; 1949, Newfoundland (10th Province) and finally, Nunavut became the 3rd Territory in 1999.

None of the land can be subject to seizure or mortgaging. Therefore, it eliminates all possibility for aboriginals to borrow on the equity on their lands; it also limits housing opportunities and business development opportunities. The use of leases to allow development and mortgaging is the only manner so far to limit the repercussion of the actual regime applied in reserve lands. This however creates other inconveniences such as the increase of costs related to overly complex transactions as a result of this lease structure.

Finally, these lands are managed by a deeds registry, administrated by the Indian Land Registry, which does not represent the current best practices type of land title registry available in Canada. It lacks with regard to title certainty and it is costly and inefficient when compared to the Torrens system.

This division of legal and beneficial title has had an important impact on economic development for First Nations communities. It has increased transaction costs (leases are expensive, it takes time to engage in the process by involving the Crown and First Nations on one side and the different capital parties on the other side, for completing the leasing and subleasing transaction structure); increased delays; it has contributed in creating a complex ownership structure and affected land dealings that require consistency with trust relationship and an accurate legislative framework.

INTERVENTION: After the *Indian Act*, was much land transferred out of Indian lands within reserves?

INTERVENTION: One of the previous mechanisms to permit development on aboriginal lands before the designation mechanism was to surrender the land completely to the Crown. In order to attract non-aboriginal investment, the Crown had to take freehold title to these lands.

INTERVENTION: About 33% to 35 % of reserve lands originally established across Canada came out of Indian lands.

1.2 OTHER CURRENT APPROACHES

There are currently two other recent legislative approaches that provide other avenues for First Nations in the management and development of their lands. The *First Nations Land Management Act*[6] provides certain components of a new land management system by making provisions of the *Indian Act* no longer applicable, giving the First Nations signatories the ability to make their own laws for the management of reserve lands. Once a First Nation enacts a land code

[6] The federal legislation, which ratified the Framework Agreement, was given royal assent on June 17, 1999 as the *First Nations Land Management Act (FNLMA).*

under *FNLMA*, dealings in their lands can be approved solely by the First Nation without the requirement for Crown approval.

The second legislative approach is the *First Nations Commercial and Industrial Development Act* passed in December 2005. This *Act* was adopted to allow the Federal Government to pass legislation to implement, by reference, provincial laws applicable on reserve land for development projects. This *Act* has only been used twice for large industrial projects and has not been used yet for market housing developments on reserve land. The aim was also to create the same system used on provincial land through the passing of federal legislation. However, it has not been used fully in practice, and there are still concerns about the cost of working with that legislation and its long term efficiency.

2. First Nation Land Title Recognition Act

The First Nation Tax Commission has been working on a new legislative framework to create a land title system on aboriginal lands in Canada. The *First Nation Land Title Recognition Act* (FNLTRA), currently under development and analysis, will be federal legislation that would provide First Nations with the option of applying a modified Torrens land title system to their lands. It would also provide for the creation of a fee simple title originally held by the First Nation or its members, which could subsequently be, transferred to First Nations members or non-First Nations members. This legislation would remove the restrictions on mortgaging, seizure and ownership, create an inalienable reversionary right (similar to an escheatment right) in favor of the First Nation and protect First Nations existing and changing jurisdiction over their lands.

This *Act* also aims to eliminate the separation between legal and beneficial ownership of the land; permitting transferability of freehold interests and opening possibilities for accessing equity in lands. The legislation would modify the actual land title system as to create one land title registration system available to all First Nations lands and which would integrate all best practices of a Torrens title registry.

2.1 Integration of the FNLTRA into the Existing Constitutional, Treaty and Agreement Framework

There are two main constitutional issues that require analysis in determining whether FNLTRA is possible. First are the proprietary issues and second, the jurisdictional issues. The proprietary issues arise because there will be a creation of new tenure and there will be a transfer of the title from the Crown (which currently holds it for the use and benefit of First Nations) to First Nations, and the creation of an inalienable reversionary right in the lands in favor of First Nations providing that said lands would revert to the First Nation on the occurrence of an escheatment event.

The Crown property interest in aboriginal lands is determined by many agreements and legislation. Section 109 of the *Constitution Act, 1867*, provides that "All Lands, Mines, Minerals and Royalties […] belong to the Provinces […]" and *St-Catherine's Milling* v. *The Queen* (1888) established that this section signifies that all underlying title to reserve lands is, *prima facie,* held by the Province. This Constitutional principle underlies the proprietary issue in all provinces in Canada. As a result of the *St. Catherine's* decision, various federal-provincial agreements were entered into which provide the Federal Government with the power to deal with the title to aboriginal lands to various degrees. Thus, the determination of whether the Federal Government has sufficient property interests in aboriginal lands to create the property interests required under FNLTRA must be done by looking, on a province-by-province basis, at the many agreements.

The jurisdictional issues result from the fact that FNLTRA is proposed to be federal legislation which changes the character of aboriginal lands. As a result, analysis is required to determine whether FNLTRA lands would retain their characterization as "lands reserved for the Indians" and therefore, be subject to federal lawmaking powers under section 91(24) of the *Constitution*. Certain tensions arise in respect to whether the lands might lose this characterization and fall under the provincial jurisdiction over property and civil rights. To analyze this issue we must look at the current constitutional jurisprudence and determine whether there is any support for the argument that FNLTRA lands retain their characterization as "land reserved for the Indians" under the *Constitution*.

Other issues inform our analysis in various ways such as the inconsistency of federal and provincial arrangements; the overlapping of provincial boundaries and treaty boundaries and the lack of normative consistency across reserves, and will require important attention and consideration.

INTERVENTION: Is it fair to say that the sovereign powers of First Nations will allow them to decide what they want to do with the land?

INTERVENTION: First Nations may, under the FNLTRA system, choose to dispose of their land but still within the framework of a Torrens system. Lands disposed of will still remain subject to the First Nations jurisdiction taxation power regime

INTERVENTION: Conveyance of property interest should perhaps be looked at in priority.

INTERVENTION: The First Nations Tax Commission is currently working on a possible amendment of the *Federal Court Act* which would allow the different legal systems (common law, civil law and aboriginal law systems) to integrate,

within the different court jurisdictions, the required expertise to deal with all demands related to First Nations jurisdictional matters.

MAIN OBSTACLES AND PROPOSED REFORMS TO CAPITALIZE INDIGENOUS COMMUNITIES' LAND RIGHTS AND INCORPORATE THEM INTO AN INCLUSIVE AND MODERN MARKET ECONOMY

MARIA DEL CARMEN DELGADO
LEGAL MANAGER
INSTITUTO LIBERTAD Y DEMOCRACIA
PERU

CALGARY, FEBRUARY 23, 2009

ILD's mission is to assist developing former soviet nations in the transition to a modern and inclusive market economy. ILD´s basic assumption states that inclusive economies that provide all people with access to the rule of law allow the transformation of property into wealth.

Extensive extra legality worldwide makes it evident that the problem at hand is significant. According to the Final Report of the *Commission on Legal Empowerment of the Poor*[7] more than 4 billion people (70% of the world population) are excluded for the global economy and most of their real estate and business assets are being held extra legally[8] (this represents a value of over 10 billion dollars). Thus, the main assets of the poor are not recognized by the law, they cannot be exchanged in the formal market, and their owners cannot optimize their use-value.

This also brings us to observe some of the consequences resulting from the absence of inclusive legal systems that recognize, guarantee and protect property rights. Main consequences are the following:

- There are no clear addresses (it is hard to find people and businesses to charge for utilities).

[7] Final Report of the *Commission for the Legal Empowerment of the Poor*, June 2008.
[8] The magnitude of extra legality is enormous. ILD conducted studies to map out extra legality in 12 countries of Latin America and the Caribbean in 2006 and came to the conclusion that more than 76% of the rural properties and 65% of the houses are affected by some degree or level of extra legality. These countries are: Argentina, Bolivia, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama and Peru.

- There is no way to differentiate locals from visitors (police control and antiterrorism actions become more difficult).
- Responsibilities of the owners of real estate and businesses cannot be enforced (it is harder to implement environmental programs, coca and other drug substitution programs).
- Information regarding businesses, real estate assets and their owners is neither accessible nor updated (urban planning, control of labor obligations and tax collection is harder).
- There is no possibility for the majority of citizens to participate in the decision making process (the social contract breaks and laws divorce from reality).
- Disperses extralegal agreements and authorities rule over national laws (formal authorities only govern a small percentage of the population).

PART I. THE MAIN OBSTACLES TO CAPITALIZE REAL ESTATE PROPERTY RIGHTS IN LATIN AMERICA

GENERAL OBSTACLES FOR ALL REAL ESTATE ASSETS

1) The lack of legal mechanisms to recognize and regularize different kinds of interests on lands and cumbersome and costly procedures to formalize property rights in urban and rural areas.[9]

2) Fails to incorporate extralegal arrangements in the legal framework – practices that are used and recognized by most citizens to prove property rights and make transactions.

3) Lack of simplified and low-cost mechanisms to identify land holders – undocumented land holders and invalid or defective identification documents (unregistered, mistaken or fake).

4) Lack of written evidence of land rights, lack of standards to document transactions and cumbersome and costly procedures to prove existing interests and transactions on land.

5) Lack of low cost and simplified mechanisms to solve boundary disputes and conflicts among competing interests on lands (i.e. nearly 60% communities at the Peruvian Coast and the High Lands are involved in boundary disputes with other communities).

[9] As examples: at the end of the 80´s, it took 728 steps and 15 years in Peru to regularize and formalize property rights in urban areas. In the case of Guatemala, at the beginning of this century, it took 237 steps and 4.6 years to formalize property rights in rural areas and 175 steps and 13.3 years in Haiti.

6) Lack of coordination among the different public entities responsible for property formalization and overlapping of competencies among some of them.

7) Lack of unified and standardized registration rules, procedures and techniques for first registration and recording of subsequent transactions on lands. [10]

8) Costly and time-consuming surveying and mapping activities and lack of standards for surveying.

9) Unjustified restrictions for economic use of property – limitations and prohibitions to sell, use, rent and mortgage.

10) Ineffective, unsecure and non-accessible registration systems that

   a. fail to provide certainty on registered rights;
   b. lack geographical data base (that links legal information with spatial data) and unable to avoid multiplicity of registered owners over the same property and superposition of areas regarding registered properties; [11]
   c. are unable to prevent deterioration, loss or destruction of public records;
   d. lack mechanisms to prevent fraudulent transactions, forgery of signatures and the use of fake ID;
   e. lack simplified mechanisms to access information and records - in some countries information is not even public.

SPECIFIC OBSTACLES FOR REAL ESTATE ASSETS OF INDIGENOUS COMMUNITIES

1) Excessive delays to enact and apply appropriate laws and regulations recognizing indigenous communities´ property rights, impeding the initiation of formalization and registration programs.

[10] In most cases, registering a simple transaction requires following long and costly registration procedures. For example, at the beginning of this century it could take 48 steps and 9 months to register a sale's contract in Mexico and 69 steps and 2 years to do the same in Haiti.

[11] For example, in the case of Honduras the lack of geographical data base of the land registry led also to a multiplicity of registered titles over the same real estate assets. In 2001, this problem was affecting all kind of registered owners, such as private owners, foreign investors owning beach resorts, public entities, local governments and native communities, among others.

2) Lack of simplified and low-cost mechanisms to accredit indigenous communities' legal existence; gain access to moral status; accredit legal mandate of their representatives and document their bylaws. [12]

3) Lack of reliable and updated information on territorial limits and difficulties to estimate the total number of parcels in villages and indigenous communities - due to non- surveyed / non-demarcated lands or outdated surveys (i.e. 90% of parcels of land within the territory of the communities at the Peruvian Coast & the High Lands has not been properly demarcated or has not been demarcated at all).

4) Excessive fragmentation of communities´ land rights, due to

    a) lack of legal mechanisms to allow the creation of corporate bodies for improving land management;
    b) imposition of co-ownership systems of holding lands among community members;
    c) continuous distribution of land rights among heirs of deceased community members; and
    d) restrictions to economic use of said lands.

5) Lack of legal mechanisms to regularize village areas located in the communities´ territories.

6) Absence of simplified and low-cost mechanisms to determine the location and boundaries of indigenous communities´ lands when contained in "historical titles" granted during the Colonial time – in most cases they have been established according to obsolete systems of measure and existing maps lack UTM geo-referencing.

7) Unjustified restrictions on communities´ property rights and lack of legal mechanisms to choose the kind of tenure that most suits their needs and interests - whether collective, individual or mixed.

8) Fails to guarantee democratic decision-making processes within indigenous communities to grant interests on their lands and make decisions on economic use. Main deficiencies are the following:

[12] For example, in some cases regularizing an indigenous community's land title in Peru could have taken five to six decades (from 53 to 65 years) due to difficulties to accredit the mandate of their legal representatives. This was the case of the Indigenous Community of San Juan de Tantarache (1938-1991) and the Indigenous Community of San Pedro de Huancavre (1926-1991), both of them located in the Department of Lima.

a) Outdated records of community members
b) Complicated procedures and excessive quorum to make decisions
c) Costly procedures to document decisions - most of them require unnecessary approvals from governmental offices
d) Lack of legal and technical advice and up-to-date information prior to making decisions
e) Lack of laws and regulations written in local language.

9) Discriminatory practices within communities – mainly against women and non-community members holding interests on communities´ lands.

10) Lack of legal mechanisms to decentralize governmental decisions on communities´ lands – in most cases this is due to the absence of regional planning instruments.

11) Failure to establish a coherent policy to harmonize indigenous land rights, investments and management of natural resources – which is also a consequence of lack of clear definition on rights regarding lands and natural resources and the absence of transparent rules and procedures to manage natural resources and grant interests on communities´ lands.

12) Lack of appropriate consultation mechanisms for the utilization and exploitation of communities´ lands and absence of standards for technical studies on environment impact of mining and other activities on indigenous communities´ lands.

13) Lack of clear compensation rules for the use of indigenous lands and eventual damages.

14) Lack of consensus building strategies and public awareness campaigns to support the approval of required reforms.

15) Lack of an integral strategy for the capitalization of indigenous communities´ lands and for coordinating all reform efforts.

16) Lack of adequate feedback mechanisms to improve the reform and adapt the legal framework to new circumstances (not being able to carry out a “learning by doing” process).

PART II. MAIN PROPOSED REFORMS TO CAPITALIZE INDIGENOUS COMMUNITIES' LAND RIGHTS

1) Institutional reforms built on those extralegal practices/arrangements that a majority of indigenous communities identify with and respect.

2) Simplified and low-cost mechanisms to accredit indigenous communities' legal existence, have access to moral status, accredit legal mandate of their representatives and document their bylaws.

3) Removal of unjustified restrictions on indigenous communities´ lands rights and establishment of legal mechanisms to choose the kind of tenure that most suits their needs and interests – avoiding imposition of any kind of fixed models, whether individual or collective (i.e. over 90% of community members individually holding lands in indigenous communities of the Peruvian Coast and High Lands).

4) Empowerment of indigenous communities to exercise ownership rights regarding their lands, being able to sell them and grant different kinds of interests and licenses – it is also important to have clear statutes on the nature, extent and restrictions of ownership rights and other interests on indigenous lands.[13]

5) Simplified and democratic decision-making processes within indigenous communities to grant interests on their lands and make decisions on economic use. Main improvements would be the following:

    a) Updated records of community members
    b) Simplified and low-cost procedures and reasonable quorum to make decisions – which includes removing unnecessary approvals from governmental offices

[13] As an example, a major reform on indigenous communities land rights was introduced in the Peruvian Constitution of 1993 [articles 88 and 89]. On the one hand, it recognizes the legal existence of indigenous communities as moral person status (there are about 7163 indigenous communities recognized in Peru. 19% of them are in the Jungle and 81% in the Coast and the High Lands). On the other hand, it acknowledges property rights on indigenous communities´ lands – whether collective or individual rights - and their autonomy to transfer ownership rights (to members and non-community members), allocates other interests on their lands and decides on economic use. It also rules that indigenous communities land rights are not subject to prescription (adverse possession); they can only be extinguished if abandoned. It is important to point out that the Peruvian Legal Framework for Indigenous Communities is integrated not only in the Constitution of 1993 but also in a set of laws, regulations and international conventions and declarations - such as the ILO Convention No. 169 on Indigenous and Tribal Peoples (1991), and the UN Declaration on the Rights of Indigenous People (2007).

c) Inexpensive procedures to document decisions;
d) Adequate technical advice and up-to-date information prior to making decisions;
e) Principal laws and regulations written in local language.

6) Repeal of discriminatory practices within communities – most of which are against women and non-community members that hold interests on communities´ lands.

7) Systematic property adjudication and registration systems to formalize and register all types of existing interests on indigenous communities´ land rights and incentives to encourage remaining within legality.

8) Simple and low-cost survey methods - information and communication technological decisions require significant attention, and should be seen as means to an end, not as ends in themselves.

9) Legal mechanisms to deal with undocumented land holders – it is extremely important to incorporate extralegal practices/arrangements that are used and recognized by indigenous communities to prove the identity of people.

10) Simplified and low-cost out-of-court mechanisms to solve boundary disputes and conflicts among competing interests on lands – including administrative procedures and alternative dispute resolution mechanisms, such as conciliation, mediation and arbitration.

11) Effective, secure, unified and accessible land registration systems.

The Peruvian experience provides us with an example for illustrating this kind of reform: A New Real Estate Registry – The Registro Predial – was created by law at the end of the 80s and began operating in 1990. Currently it is under the National Superintendency of Public Registries (SUNARP) [14] Main attributes and characteristics of said registry are the following:

- It is competent to record land rights in newly formalized areas, coexisting with the traditional Real Estate Registry (created in 1888). [15]

[14] SUNARP is an autonomous entity of the Justice Sector whose objective is to dictate policies and regulations in both registration techniques and administration of public registries
[15] The idea was to gradually replace the old registration system, linking together all existing public real estate registries. Said registries were officially merged in 2004, but they have not yet been integrated in reality.

- It is provided with simplified, decentralized, standardized and low-cost procedures to facilitate and encourage not only first registration but also registration of transactions of formalized assets.

- It is also provided with a field operation strategy to carry out formalization activities with the support of stakeholders.

- Its registration system – which is a modified version of the Spanish registration system - is governed by registration principles that offer legal security, certainty and protection of registered rights against third partied (legality, publicity, priority, liability or public faith, legitimacy, chain of titles, specialty) [16]

- It is provided with a leading-information-technology that guarantees easy and inexpensive access to registration entries and recorded information.

- It is provided with effective mechanisms to guarantee security of existing records, preventing deterioration, lost and destruction of public records.

- It has a geographical database. It provides a unique registration number for each parcel, linking legal information with spatial data and preventing multiplicity of owners over the same property and superposition of areas regarding registered properties. [17]

- It uses relatively simple and low-cost survey methods.

- It is able to establish links with other registries managed by private and public entities (such as the National Registry of Identification and Civil Status, the Tax Authority, the superintendence of Banks and Insurance; the National Superintendency of Public Records, the National Office for Pensions, the Social Health Insurance System, among others)

12) An integral strategy for the capitalization of indigenous communities´ land rights and efficient institutional mechanisms to formalize property, coordinate all reform efforts and improve the legal framework.

[16] Both land registration systems in Peru (the traditional and the new one) – which are supposed to be unified in the short term - are a modified version of the Spanish registration system. Both systems are neither a Deeds Registry nor a Title Registry System, but have more similarities with a Title Registry System. They are governed by registration principles that offer legal security, certainty and protection of registered rights against third parties. Registration of titles is not mandatory but it is required to enforce rights against third parties.

[17] In both systems (the traditional and the new one) registration is organized on the basis of the parcel (real folio) but only the Registro Predial System has a geographical database.

Once again, the Peruvian experience provides us with an example to illustrate the kind of institutional arrangements that could be appropriate for these purposes: In 1996, the Commission for the Formalization of Informal Property (COFOPRI) was created. This Commission was initially responsible for property regularization in urban areas. Since 2007 its functions has been temporary extended to rural areas, including indigenous communities. [18] Main features of COFOPRI are the following:

- It is a public entity created by law and placed under the President of the Republic. Its main mandate is to lead and manage property formalization activities in Peru.

- It is administratively, economically and financially autonomous.

- It has executive and regulatory powers for: Implementing property formalization programs nation-wide in urban and rural areas for any kind of extralegal holdings; providing standards and improving methodologies and procedures to facilitate property formalization; supporting implementation of alternative dispute resolution mechanisms; providing technical support to implement decentralized registration offices nation-wide and simplify registration procedures; developing a strategy and providing mechanisms to encourage the maintenance of formalized assets within legality; establishing mechanisms to facilitate access to credit and public services; making an inventory of state-owned lands available for housing and other purposes; establishing mechanisms for fine-tuning the formalization and registration systems and adapting the reform to new circumstances.

13) An information system to facilitate access to credit.[19]

[18] In the medium term, the management of property formalization activities in rural areas and indigenous communities will be transferred to the Regional Governments. Currently, COFOPRI has the mandate to draft new regulations for improving existing methodologies and procedures so as to facilitate formalization activities all over the country.

[19] As an example, in the case of Peru, a new information system was designed in order to facilitate access to credit by owners of newly formalized properties: the COFOPRI´s Positive Information Bureau (PIB) was designed as an instrument for the promotion of small investment and credit programs and commercial and productive opportunity links, centered on specific financial products and services in formalized areas. The PIB manages information of 1.4 million formalized and registered real estate assets in urban areas, the owners of said properties and their business activities. It utilizes information from the New Real Estate Property Registry (Registro Predial Urbano) and other public and private sources, such as the National Registry of Identification and Civil Status, the Tax Authority, The superintendence of Banks and Insurance, the National Superintendency of Public Records, the National Office for Pensions, the Social Health Insurance System, the Bank of Building Materials, Electricity and Water Supply Companies, among others.

14) Mechanisms to decentralize governmental decisions on communities´ lands – such as developing regional planning instruments.

15) Legal mechanisms to discourage excessive fragmentation of communities´ land rights - such as allowing the communities to create corporate bodies to improve land management and eliminate restrictions for economic use.

16) A coherent policy to harmonize indigenous land rights, investments and management of natural resources - including clear definition of rights regarding lands and natural resources and transparent rules and procedures to manage natural resources and grant interests on communities´ lands.

17) Appropriate consultation mechanisms for the utilization and exploitation of communities´ lands and standards for technical studies on environment impact activities on indigenous communities´ lands.

18) Clear compensation rules for the use of indigenous lands and eventual damages.

19) Effective consensus building strategies, well founded public awareness campaigns and far reaching publicities of all types.

20) Maximum community involvement and participation of beneficiaries and main stakeholders to facilitate formalization and diminish the risk of allocating village/community lands to others. This includes, for example, door-step meetings with land holders and adequate legal and technical advice prior and after the formalization process takes place, village-wide meetings, and briefing sessions with community leaders, grassroots organizations and representatives of central and local governments, etc.

One of the main lessons learned by ILD during two decades of designing and implementing property formalization and capitalization reforms all over the world, is that public awareness campaigns, consensus building strategies, maximum community participation and wide publicity are crucial in order to succeed. [20] Taking into account that the institutional reform process is “a learning by doing”

[20] For example, in the case of Peru, consensus to overcome resistance and facilitate the approval of the required legal reforms was built by publishing draft laws in the main newspapers, encouraging public feedback, organizing public hearings for discussions all over the country, and disseminating and explaining the benefits of property formalization to major groups of stakeholders. For that purpose TV and radio spots and advertisements in the main newspapers were utilized. At the same time, a special methodology and a set of legal and operative mechanisms were established in order to guarantee maximum community participation and involvement of major stakeholders during the implementation of the formalization programs.

process, feedback mechanisms to improve the reforms and adapt them to new circumstances are also fundamental elements during the implementation phase. It is also important to disseminate main achievements, highlight the participation of major stakeholders and demonstrate a high political leadership when implementing the reform.[21]

[21] As an example, in the case of Peru, all the Presidents during the last two decades have been involved in different property formalization initiatives and programs. Main newspapers, TV channels and radio stations have been continuously advertising public ceremonies where Peruvian Presidents have been awarding formalized property titles to beneficiaries. Major benefits of property formalization and main achievements of the formalization programs have also been widely disseminated.

THE AUSTRALIAN CONSTITUTIONAL FRAMEWORK AND INDIGENOUS COMMUNITIES

MAUREEN F. TEHAN
ASSOCIATE PROFESSOR
UNIVERSITY OF MELBOURNE
AUSTRALIA

CALGARY, FEBRUARY 23, 2009

The current Australian Government is concerned with different realities touching indigenous communities all over the Commonwealth. Its policies are oriented toward the alleviation of indigenous disadvantage and poverty in health outcomes, education employment, housing and community wellbeing. Therefore, the Government has integrated economic development, empowerment and direct service provision as part of its response to address these concerns.

CONSTITUTIONAL AND LEGAL PROVISIONS

The *Australian Constitution* sets out all the powers allocated to the federal level (s51). The States have all residual powers. Powers may be exercised concurrently by the Commonwealth and State Governments. Where there is any inconsistency between Commonwealth and State legislation, the Commonwealth legislation will prevail (s109). Commonwealth territories are entitled to self-government but the Commonwealth Parliament has the power to disallow their legislation. Some local governments are established under the State legislation. There are no constitutionally entrenched powers protecting local government. Some nascent strategic and specific forms of indigenous self-governments are now emerging under State and Territory legislation.

Indigenous people were subject to State legislations and powers until 1967. Following a referendum, these powers were transferred at the federal level and became concurrent with State legislation unless they were inconsistent. The Commonwealth can influence and control State government activities through laws made to implement international treaty obligations under Foreign Affairs power. The Commonwealth Parliament is entitled to acquire property, including that of States on just terms. There is however a concern that certain prescriptive federal actions might amount to an acquisition and render the Commonwealth Government liable to compensation payments to the States.

Division of financial powers between the Commonwealth and the States has an impact on development and implementation of policy. Commonwealth taxing powers include income tax, company tax, goods and services tax, customs and excise duties. The States retain payroll, land and some banking taxes. The Territories are treated as states for these purposes. Funds are distributed in a variety of ways. The Commonwealth and the States agree on payments to the States. Some grants to the States are tied and must be spent in conformity with conditions imposed by the Commonwealth (s92). The Grants Commission makes recommendations for the distribution of funds based on needs based formula. Payments to the States and Territories are based on indigenous populations but there is no requirement to spend payments on indigenous peoples. Some have described these intergovernmental relationships as dysfunctional with a negative impact on indigenous communities: See Langton & Mazel 'Poverty in the Midst of Plenty Journal of Energy and Resources Law (2008) 26(1).

Across the Australian Government, programs and policies for indigenous people are the responsibility of a range of government agencies, but these programs and policies are managed in a whole-of-government way. The whole-of-government arrangements are based on coordinated policy development; efficient, flexible and strategic use of funds across Australian Government agencies (administering both Indigenous-specific and mainstream programs); active engagement and consultation with Indigenous people and finally on partnerships with indigenous people, State and Territory Governments and the private and non-government sectors to produce benefits for indigenous communities.

The network of Indigenous Coordination Centres[22] across Australia is responsible for local engagement with indigenous Australians and the coordination of programs at local and regional levels.

The COAG (Council of Australian Governments) Working Group on Indigenous Reform brings together the Australian Government and all State and Territory Governments. The Working Group's objective is to close the gap on Indigenous disadvantage, focusing on these targets:

- To close the life-expectancy gap between Aboriginal, Torres Strait Islanders and other Australians within a generation
- To halve the mortality gap between Aboriginal and Torres Strait Islander children and other children under age 5 within a decade

[22] For more information about these Centers, see: www.facsia.gov.au/internet/facsinterne.nsf/aboutfacs/contactus_network.htm.

- To halve the gap in literacy and numeracy achievement between Aboriginal and Torres Strait Islander students and other students within a decade

- To halve the gap in employment outcomes for Aboriginal and Torres Strait Islanders within a decade

- To at least halve the gap in attainment at Year 12 schooling (or equivalent level) by 2020

- To provide all Aboriginal and Torres Strait Islander four year olds in remote communities with access to a quality preschool program within five years.

Bilateral agreements between the Commonwealth, State and Territory Governments are used as instruments for the implementation and delivery of government policy under the *National Framework of Principles for Government Service Delivery to Indigenous Australians.*

1- INDIGENOUS COMMUNITIES: FORMS OF LAND TENURE AND RIGHTS

a. ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976

Australian Aboriginal law and land rights are recognized in the *Aboriginal Land Rights (Northern Territory) Act 1976*. This *Act* allows indigenous communities to initiate processes to recover their land through Land Councils and manage all resources that emanate from these lands. It recognizes also the aboriginal system of land ownership and integrates the concept by means of an inalienable freehold title.

Section 3 of the *Act* interprets the expression “traditional aboriginal owners” of these lands as local descent groups who have a common spiritual affiliation to a site on the land, that place the group under a primary spiritual responsibility for that site and for the land. In addition, these sites are entitled by Aboriginal tradition to forage as of right over the land.

The land title is an inalienable freehold title which is registered in the Torrens system and held by a Land Trust. The powers of the Trust are limited to holding the title and to exercising its powers for the benefit of traditional owners. These powers are exercised by the direction of the relevant Land Council which must ensure that the traditional owners understand the nature and purpose of the proposed action and as groups, consent to it. The land council also makes sure that any other Aboriginal group or community that may be affected has had an opportunity to express its views.

The power related to the use and management of the land specifies that the land cannot be sold or mortgaged. It is however possible to lease to any person for any purpose with Ministerial consent. It is also possible to mortgage the lease. Leases may be granted without Ministerial consent to an aboriginal person or aboriginal council for business or community purposes for less than 21 years, or to Government for public purposes, or to a mission for mission purposes or to any other person for any purpose for less than 10 years.

Recent changes to the *Aboriginal Land Rights (Northern Territory) Act* 1976 determine that Land Trusts are permitted to lease 'townships' to a Commonwealth (Federal) Government entity for terms of 40 years or more. The original provision required 99 year leases but amendments in 2008 allow for leases of lesser terms than 40 years. The government entity is empowered to sub-lease blocks in the township for periods up to the term of the head lease. There is no requirement to consult with customary title holders in relation to the sub-leases, nor in relation to any other matters related to the township such as planning, development, etc. These leases and sub-leases will be registered in Torrens registry. Surveying is underway and groups can choose to negotiate head leases. If they negotiate head leases, they have no power to approve any sub-lease, terms of sub-lease, purpose of sub-lease or identity of sub-lease. They may negotiate for consultation on various management and planning issues.

Rent is payable by the Commonwealth to the Land Trust for the head lease. Rent paid for the sub-leases will be used to fund the system.

There are many possible reasons and arguments for these changes but some of these include the following. There is a segment of the Australian community and some politicians who are concerned by the expansion of Aboriginal land and seek to 'open' it up to others. There is also a developing view among some indigenous leaders (among others), that individual title is essential for capital raising which in turn is crucial for economic development. While there has always been a capacity to lease, high transaction costs under these existing leasing regimes, especially for small areas of land and residential blocks within communities, have been identified as a disincentive for leasing. The Government identified the desire to encourage home ownership and the use of land as security for loans to expand housing stock as further reasons for moving to a leasing scheme that supported individual titles.

b. State Statutory Land Rights Schemes

Most states have legislated their own statutory schemes. Some are based on traditional association (Qld, SA), some are based on historical association or accident (Qld), and some are just land grants of available land (NSW, Victoria). Within these schemes there are different systems for holding title including

inalienable freehold, leasehold, alienable freehold and some land is still aboriginal reserve land. Land held in all these schemes is registered in States Torrens Registries.

Key features of these schemes in the Northern Territory and States include: Title is granted to a land holding body – usually in some form of communal title; titles are registered in the Torrens system, usually a single title often covering large areas of land and a number of different communities; leases can be registered; internal land issues and allocation of title/rights within the indigenous land holding group are not covered by Torrens and are usually left to the group to determine according to its laws or some other agreed scheme.

As with the *Aboriginal Land Rights (Northern Territory) Act* 1976, the States are also moving to make changes to their systems: Queensland has amended its *Aboriginal Land Act* to allow development of similar individual titling schemes. Currently, land is being surveyed and the system developed with negotiations taking place with indigenous landholders in various circumstances is delivering new negotiated arrangements. Details are still emerging. In South Australia, the *Pitjantjatjara Land Rights Act* 1981 (SA) has been amended to allow leasing of individual blocks to cover government and third party entitlements as well as communal entitlements for housing and other purposes.

c. The Native Title

Native Title is based on traditional law and custom in effect when sovereignty was acquired. It is recognized in the well known *Mabo* decision and is now largely governed by the *Native Title Act 1994.* It is perhaps best described as an amalgam of the Canadian concepts of aboriginal rights and aboriginal title, and the rights range from exclusive possession akin to a fee simple title for some groups, to very limited camping and hunting rights for others.

The Crown possesses an underlying title which represents a conceptual relationship with native title and it is not clearly articulated. However, the native title is subject to laws of Federal and State Governments. There is no fiduciary obligation of the Crown that is recognised, there is no concept of self-government or entitlement to control land recognised and no constitutional recognition or protection is granted under the Native title.

Native title is subject to a Commonwealth legislative scheme. Through a range of constitutional principles and instruments, the Commonwealth can require state compliance with its scheme for managing native title claims and activity on native title land. However, the main litigants in native title claims, apart from the claimants, are the States (under Commonwealth legislation) because of their powers in relation to land use, resource extraction and environmental

management. Claims are made and managed through federal courts and the National Native Title Tribunal.

A successful claim for native title results in a determination of native title in favour of an identifiable group of people. The determination is filed with the National Native Title Tribunal and a copy is delivered to the local land registry but not actually registered.

d. Conclusion

Some of the reform activities in relation to indigenous land are supported because of anticipated benefits to the Government. They would allow for the transfer of housing costs from Government to individual. They are also part of general policy development for economic development of indigenous communities. There is no discussion regarding separate and indigenous controlled land title systems even though the current changes could allow and even facilitate the development of such systems in indigenous land owners' control.

FIRST NATIONS' LAND TITLE RECOGNITION ACT

DISCUSSIONS AMONG EXPERTS

CALGARY, FEBRUARY 24, 2009

The present overview focuses on the exchanges between participants relating to the *First Nations' Land Title Recognition Act.*

In the process of designing the First Nations' legislation and facilitating their power, three basic objectives have been determined:

1- Recognizing the underlying First Nations title to create reversionary rights to First Nations underlying title;

2- Creating legal framework for First Nations Torrens title system

OPTION A: First Nations have the right to make laws with respect to:

i. Land Title
ii. Land Registry
iii. Land Surveying

OPTION B: Standards and rules included within one standard legislation for First Nations.

3- Creating First Nations Land Title Institutions.

DISCUSSIONS AMONG PANELLISTS: THE BEST OPTION

OPTION A

Option A possesses the right to make laws with respect to land title, land registry and land surveying. This would establish institutions to ensure that laws meet certain standards.

This option would favour a kind of "opting-in" in which First Nations would draft their own piece of legislation that would address different needs and meet specific standards. The possible downside from choosing this option could be the

creation of multiple systems, reducing the benefit of an overall system and creating different standards for every First Nations land title system.

OPTION B

Option B proposes the creation of one standard system that could integrate all benefits of a Torrens System for all First Nations.

This option would be in line with the different approach privileged in Australia through the harmonisation of titles with the different states legislations regarding land registry. Furthermore, it would follow the approach privileged by Peru where the Central Government created two different Land Registry Systems: One for the native communities located in the jungle and another Land Registry System for the peasant communities located in the Coast and the High Lands. In the long term, both communities expressed the need to be integrated into the national Land Registry System which was perceived as being more efficient and providing more certainty and protection of their titles. Therefore, the Central Government had to harmonize these systems with the national system. In the United States, some studies have demonstrated that the land title system created more certainty than the states system due to its accessibility and transparency.

One model of law could be more efficient for building capacities and making the markets work on First Nations land. The benefits of this single model approach have been seen in the steps leading up to the adoption of the *First Nations Fiscal and Statistical Management Act* (FSMA)[23]. In this scenario, the adoption of one standard law would follow the educational and institutional scheme that is enjoyed already by the Commission.

This approach is oriented toward the creation of one national institution which would elaborate one educational strategy and work with one model legislation. Possible problems that could be encountered with regard to harmonizing the Québec Civil Code with a national legislation were underlined. In contrast, these kinds of issues are not subject to the Northern Territories, which have a system more similar to the other Western Provinces of Canada.

The Nisga'a Nation has created its own legislation touching land title system. Its interests are not registered in the British Columbia land title system but in a separate land title system for the Nisga'a Nation. This is due to the fact that the Nisga'a wished to place certain restrictions on land ownership to ensure security of the title and protect against alienation of the land. This was not compatible with the current laws governing the provincial title system. However, the actual titles

[23] The FSMA legislation aimed in delegating the real property taxation power on reserve lands to First Nations and created the necessary national aboriginal institutions and regulations for the enforcement of theses powers on First Nations communities.

are similar to the one of the provincial system, resulting in some convergence of interests on the administrative level.

Some concerns were raised relating to multiple land title systems. The concerns addressed the high costs that would be assumed by the Federal Government in relation to the creation and the viability of these different systems. The matter of time for First Nations to adapt the Torrens System to their specific needs has to be considered. For these reasons, Options A and B will have to be analysed also in terms of projected costs.

Participants underlined that the demand for investment could be affected by accessibility and transparency of many systems or one unique standard system. One model piece of legislation would encourage investors to feel more secure. Those who take time to study the law and its functioning will have more negotiation power, and will increase their motivation to invest. This single system could increase the demand for investment, while the existence of a multiple systems may reduce accessibility and investor confidence.

Consequently, discussions underlined the interest to consider a model that would include option A and B, by creating standards. As an example, the *Uniform Conservation Easement Act* in the United States was a model law drafted in the early 80's and enacted by only 35 states (the remaining 15 states did not integrate it into their state legislation.) Today, it is interesting to observe different patterns of conservation in the States that have not enacted the model law and consider also that the implementation instruments in these 15 states are not yet very clear. Thus, this could serve as a clear example of some possible outcomes in having Option A implemented instead of Option B.

Some suggested that critical analysis should focus on the fact that the current multiplicity of systems complicates the approach in addressing the needs and remedies for the creation of a more efficient land title system.

It is very difficult to create things in isolation. Thus, some panellists could not see Option A working because of the amount of work required to implement a specific system for each community. Using consistent legislation could facilitate implementation of an efficient land title system.

Other insisted on the fact that there will have to be some correlations made with the provincial system, and that it would be important to think about the kind of standard that will be compiled by First Nations as to have one unified First Nations Registry System. In Egypt, the population addressed the argument of unconstitutionality because they felt excluded from the central system which was created in parallel to a specific informal system for regions. Egyptians thought that the central system was better and more efficient that the one in their informal regions.

To eliminate the possibility that this situation occurs in Canada, it is essential to think about a methodology that would include option A (the assessment of First Nations communities' needs) and merge it into a standardized B option.

EFFICIENT SURVEY SYSTEM

The establishment of a survey system would also require a serious study of the needs and issues that each First Nation community is currently facing. Surveying methodologies to be adopted will have to be the result of a true diagnosis of the different problems to be addressed and resolved in respective communities.

The system will have to be competitive in the matter of recording titles and it will need to maximize its convergence with the provincial system. It will also be central to think about the officer who will be in charge of recording all titles. It is imperative to facilitate the administration of the system by reducing its knowledge to two systems (one provincial and the other for First Nations) instead of dealing with different systems for each First Nations community. This supports again the need for one land title system on reserve lands. This would also diminish the need to require specific expertise to access the system.

Some panellists added that a good registry system must be informed by an efficient survey system. By focusing on the survey, it may be possible to get support specifically from the Ministry of Finance, because a comprehensive survey would aid resolution of existing disputes, assist with matrimonial property issues on reserve, and buttress economic development both today and following the implementation of a Torrens based registration system.

IMPORTANCE OF COMMUNICATION CAMPAIGNS

One of the most important aspects of this process will be to establish an efficient communication campaign to share the results of the needs assessment. Accordingly, people will identify themselves with the process and support its implementation.

Some participants used certain data regarding the benefits of implementing a program touching First Nations market reforms which would improve land and market certainty. It has been demonstrated that the benefits of implementing such a program would be nine times the overall costs of implementing these reforms (over a period of 15 years). This represents an important example of a powerful message which would be subject to dissemination. Political leaders and stakeholders would need to be reached through an efficient communication campaign.

FIRST NATIONS LAND REGISTRY SYSTEM COMPATIBLE WITH THE PROVINCE LAND REGISTRY

The issue of inconsistency between different land titles systems was also raised. Addressing this issue through the Canadian *Constitution* is one of the main challenges. However, there is a serious need to work closely with the Provinces and render the First Nations systems consistent with the provincial land title system already in place.

A panellist also considered that most First Nations communities were located in Western Canada (including Ontario, Manitoba and British Columbia) and that the treaty framework was comparable in these provinces. This led to the conclusion that Québec would not matter that much on the economic level, more on the political level and therefore, the Eastern First Nations communities should not be taken into consideration when discussing a national legislation.

Others added that there is a need to establish relationships with provinces that already have consistency between their respective systems. Subsequent to this, there would be a need to work with the other provinces that are facing more inconsistency of their respective systems with one eventual national system. All issues have to be approached and studied carefully. This is the reason behind the understanding of the Québec model and getting its support on the conceptual level.

Many lands on reserve in Québec are administrated under different legislation and not anymore by the *Indian Act.* This aspect complicates approaches for the study of Québec and Labrador land regime.

Some inquired about the reality of extinction of rights and also the reversion rights (referring to the situation where the transmission of the land title which belongs to the Crown could be transferred to the Provinces in priority rather than to the First Nation Band).

It was noted that the structure of the *Indian Act* (particularly provisions 6(1) and 6(2) of the *Act*) and intermarriages between First Nations members and non-aboriginal would have the effect of extinguishing certain communities, a hundred years from now.[24]

[24] Regarding the discriminatory effect of section 6 of the *Indian Act*, see two recent decisions from the Supreme Court of British Columbia (2007) and the Court of Appeal of British Columbia (2009), respectively: *McIvor* v. *The Registrar, Indian and Northern Affairs* 2007 BCSC 827; *McIvor* v. *The Registrar, Indian and Northern Affairs* 2009 BCCA 153.

The avenue of converting the deed systems into a Torrens land title system was proposed. This proposition urges conversion rather than the creation of a new system with high surveying costs.

Some maintained that treaties and self-governance will always have to be considered in the creation of new legislation. The legislative project will release First Nations from the administration of the *Indian Act* by creating institutions that would accommodate First Nations needs, treaties, self-governance initiatives and matrimonial realities. It was noted that so far, the *Indian Act* wasn't helpful for First Nations and that there is a willingness to be integrally part of the Federation which cannot be achieved through the *Indian Act*.

WORKING GROUP MEETING ON INDIGENOUS LAND TITLE SYSTEMS

FINAL REPORT

VANCOUVER, MARCH 2-3, 2009

EXECUTIVE SUMMARY:
SECOND EXPERTS' ADVICE SESSION

The second experts' advice session gathered the same experts around the legislative project. The session was also an opportunity to further discuss the Canadian constitutional mechanism surrounding treaty federalism and the consistency of the *Indian Act* with Aboriginal machinery rights included in the *Constitution*.

Discussions focused mainly on section 35(1) of the *Constitutional Act of 1982* which guarantees treaty rights and section 52 of the *Constitution* which establishes that the *Constitution* is supreme and that federal and provincial laws have to be consistent with constitutional principles. This issue was a mean for international experts and main drafters to re-contextualize the legislative draft within the political and the constitutional spectrum of the Canadian federation.

The second session also provided the opportunity to get familiar with central aspects relating to investment on American Indian reservations. Questions were raised pertaining to borrowers' access to private credit on reservations and its relation with submission to commercial laws and courts surrounding these reservations.

Furthermore, it has been an occasion to understand some aspects of the land tenure system in South Sudan. The recent creation of the Southern Sudan Land Commission and the passing of the Southern *Sudan Land Act* were both commented.

Besides these exchanges, further discussions surrounded recent changes regarding the South African communal tenure reform program that were of great interest regarding challenges encountered in Canada.

Focus was oriented mainly toward the restitution of lands to communities and individuals formerly removed from their lands in terms of colonial and apartheid legislation. Some aspects touching the redistribution of agricultural lands to farmers who were previously excluded from acquiring such lands were further shared. The foreseen promulgation of the *Communal Land Rights Act of 2004* has been presented comprehensively.

TREATY FEDERALISM AND HONOURABLE GOVERNANCE

PROFESSOR JAMES (S'AK'EJ) YOUNGBLOOD HENDERSON
PROFESSOR AND RESEARCH DIRECTOR
THE NATIVE CENTER OF CANADA
CANADA

VANCOUVER, MARCH 3, 2009

The presentation focused mainly on section 35(1) of the *Constitutional Act of 1982* which guarantees treaty rights and section 52 of the *Constitution* which establishes that the *Constitution* is supreme and that federal and provincial laws have to be consistent with the constitutional principles. The main question that arises from these constitutional provisions is the consistency of the *Indian Act* with Aboriginal Machinery rights included in the *Constitution*, regardless of what its provisions stipulates.

Anyone embarking in a discussion on First Nations and non-First Nations relations in Canada is faced from the outset with a virtually insoluble dilemma: Since every man is the product of the culture into which he is nurtured and educated, his thinking will invariably follow certain well-defined lines. To change the direction of such thinking is as difficult as changing the color of one's skin, and probably more painful.[25] This is the challenge that the Crown is facing today: Adjusting its thinking to a new constitutional framework. The Supreme Court of Canada jurisprudence has been trying to interpret what are the rights of First Nations in Canada and how the Crown should approach these rights. It is a painful process, but it is important to get through it.

About 90% of Canadian territory is covered by treaties. The remaining percentage is covered by the aboriginal title. It is therefore important to understand this form of federalism which was the first of its kind created by the Imperial Crown in Canada. The second form of federalism, which results from treaty federalism, is provincial federalism and it comes out of the imperial acts of Parliament.

[25] Historian George F.G. Stanley, 'As Long as the Sun Shines and Water Flows: An Historical Comment," in *As long As The Sun Shines And Water Flows: A Reader In Canadian Native Studies* in A.L. Getty and Antoine Lussier eds., Vancouver: University of British Columbia Press, 1983, p.1.

1. TREATY FEDERALISM

The 1726 Treaty with the Mi'kmaq provided that "His Majesty promised the district chiefs that they "shall not be Molested in their Person's, Hunting, Fishing, and [Shooting &] Planting on their planting Grounds nor in any other Lawfull Occasions, by his Majesty's Subjects or their Dependants." Additionally, the sovereign promised that: "If any Indians are Injured by any of his Majesty's Subjects or their Dependants they shall have Satisfaction and Reparation made to them According to his Majesty's Law: Where of the Indians shall have the Benefit Equally with his Majesty's other subjects".

The Mohegan Indians Decision of 1743 provided that the "Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated as such, they have a policy of their own, they make peace and war with any nations of Indians when they think fit, without control from the British. It is apparent the Crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and his present Majesty's commission by which we now sit. And it is plain, in my conception, that the soil of these countries; and that their lands are not, by his Majesty's grant of particular limits of them for a colony, thereby impropriated in his subject till they have made fair and honest purchase of the natives".

The 1761 ratifying treaties with the "several Districts of the Mi'kmaq Nation" provides that "[t]he Laws will be like a great Hedge about your Rights and properties–if any break this Hedge to hurt or injure you, the heavy weight of the Law will fall upon them and furnish their disobedience." This meant also that the Mí'kmaq treaties are considered as a protective "wall" between Mí'kmaq law and the British law: "On behalf of us, now your Fellow Subjects, I must demand, that you Build a Wall to secure our Rights from being troden [*sic*] down by the feet of your people." This demonstrates that authority to use British law in the colonies comes from treaties and not from any other imperial legislation.

The 1760 Treaty provided that "THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe". The Supreme Court of Canada famous case *R.* v. *Sioui*[26] concluded that "from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations".[27]

[26] *R.* v. *Sioui* [1990] 1 S.C.R. 1025.
[27] *Ibid*., p. 1052-53.

Article XXIII of the 1763 *Treaty of Paris* and Article 40 of the *Capitulation Act of Quebec* are important because they restore all reserved territory of Aboriginal nations and protected Aboriginal tenure. The Aboriginal tenure protected by the treaties was sacred and inviolable despite the land reorganization that resulted from the wars.

The 1763 Royal Proclamation was directed at colonial governors and it affirmatively protected the treaty and Aboriginal rights of the "several Nations or Tribes of Indians with whom we are connected, or who live under our Protection." The 1764 Treaty of Niagara was directed to First Nations and provided that he Proclamation strictly ordered colonial authorities that the Indian nations within the existing colonies "should not be molested or disturbed in the Possession of such Parts of our Dominion and Territories as not having been ceded to or purchased by Us."

Despite the King's affirmation in the Royal Proclamation to the effect that Western Tribes were under the protection of the Crown, Lieutenant Governor Simcoe of Upper Canada declared to Western Indians, in 1793, "That no King of Great Britain every claimed absolute power or Sovereignty over any of your Lands or Territories that were not fairly sold or bestowed by Your Ancestors at Public Treaties". This has also been reinforced in the Supreme Court Case *R.* v. *Van der Peet*,[28] by Madame Justice Claire l'Heureux-Dubé: "[I]t is fair to say that prior to the first contact with the Europeans, the Native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs." Another Supreme Court Case, *R*. v. *Côté*,[29] affirmed that "In its diplomatic relations, the French Crown maintained that Aboriginal peoples were sovereign nations rather than mere subjects of the Monarch".

The Supreme Court of Canada, 2004,in *Haida Nation* v. *British Columbia*[30], resumes all these principles and states that "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act*, 1982".

The analysis of Treaty federalism and Court decisions up to 2004 provides us with enough historical information to conclude that that Indians are not subject of the Crown and that they have a particular treaty relationship with the Crown implying no particular relationship with colonial governments. Aboriginal sovereignty is reconciled with Crown sovereignty but it should be said that Crown sovereignty is derivative. It is not an original title. It would be an original title in Great Britain but in Canada, anything the Crown claims, must derive from a treaty. From this analysis, we can also precise that the Aboriginal title is the

[28] *R*. v. *Van der Peet* [1996] 2 S.C.R. 507.
[29] *R*. v. *Côté* [1996] 3 S.C.R. 139 at paragraph 48.
[30] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73.

source of all law in Canada. It is a completely new way of understanding relations of power that resulted from historical relationships between First Nations and the Crown.

2. TREATIES TRANSFORM ABORIGINAL GOVERNANCE INTO VESTED TREATY GOVERNANCE

Most clauses in the Victorian Treaties stipulate that "Whereas all the Indians inhabiting the said country ... made certain Chiefs and Headmen who should be authorized on their behalf to conduct [treaty] negotiations and to sign any treaty [with Her Most Gracious Majesty, the Queen of Great Britain and Ireland] to be found thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands and such obligations as should be assumed by them". These clauses are often forgotten in Canada. But the usual description found in the Victorian Treaties basically says that "Tribes of Indians and all the other Indians inhabiting the district" do hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits [land description], To have and to hold the same to Her Majesty the Queen and Her successors forever". This touches the relations between the Imperial Crown and the First Nations. It has no relation at that moment with the colonies.

This has been changed somewhat in Treaty number 5 were it is said that "in consideration of the provisions of the said treaty being extended to us, transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, *to and for the use of the Government of Canada*, all our rights, titles and privileges whatsoever which we may have or enjoy in the territory described in the said treaty, and every part thereof and to hold to the use of Her Majesty the Queen, and heirs and successors forever".

But the key clause in the majority of treaties is the "Peace and good order clause" which says that in lands ceded to the Imperial Crown even for the use and the benefit of Canada, the Chiefs will assure peace and good order and will regulate property among everyone (Metis, Indian, non-Indian) in ceded territories. That provision transforms treaty governance into a constitutional concept. In effect, treaties were transferring the land to the Imperial Crown, and the Imperial Crown were inserting the Chiefs as the government of the ceded territories. Nowhere is the Government of Canada or the *Indian Act* mentioned. This process transformed the Chiefs into the constitutional governments of said treaty areas of ceded lands. Provisions also state that if the Crown wants to acquire land for settlement, it has to ask the Chiefs who in turn will work out the process.

Aboriginal treaty rights were then recognized and affirmed in Section 35(1) of the *Constitutional Act of 1982* and the Supreme Court of Canada states that this section does not purport to create rights but it affirms existing rights and insist on

the fact that these rights are aboriginal: “Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are held only by aboriginal members of Canadian society”.[31] These rights have therefore their own source and they do not derivate from British law or Canadian law. They are *sui generis* rights, unique in themselves and have a distinct and separate constitutional jurisdiction.

Section 51(1) of the *Constitution of 1982* provides that the *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect. Therefore, as section 35(1) is also part of the *Constitution*, any legislation that would be inconsistent with aboriginal tenure rights can be held of no force and effect. But the question raised by the courts pertained to the interpretation of section 91(24) of the *Constitutional Act of 1867*?[32] The question has given birth to the doctrine of constitutional convergence which stipulates that all parts of the *Constitution* have to be read together and in symbiosis, and that any provision can’t be extinguished without a constitutional amendment.

In addition, the terms included in section 91 which refers to the power of the Queen to “make Laws for the Peace, Order and good Government of Canada (…) for Indians and Lands reserved for Indians” with regards to First Nations has been replaced with the doctrine of the Honor of the Crown. The doctrine arises from the “Crown’s assertion of sovereignty over an Aboriginal peoples and *de facto* control of land and resources that were formally in control of that people” as established by the Supreme Court case *Haida Nation*.[33]

This doctrine asserts that the Crown must act with honor and integrity and avoid the appearance of “sharp dealing”. The doctrine creates contextual spectrum of responsibilities and includes constitutional fiduciary duties and constitutional duty to consult, accommodate, and negotiate with Aboriginal peoples. The doctrine always operates in Crown dealings with Aboriginal Peoples and arises with the Crown’s assertion of de facto sovereignty over Aboriginal lands. It infuses every treaty and is applied in concrete practices of the Crown.

Justice Binnie stated in the *Mitchell*[34] Supreme Court Case that “the parallel relations between Crown and Haudenosane in its “modern embodiment” is the notion of the merged or shared sovereignty under the general concept of Crown sovereignty” and he added at paragraph 9 of the same case that "[with this

[31] *R*. v. *Van der Peet*, at para. 19.
[32] Section 91(24) of the *Constitutional Act of 1867* provides that the Parliament of Canada have jurisdiction to make law with regards to “Indians and Lands reserved for the Indians”
[33] *Haida Nation* v. *British Columbia (Minister of Forests),* [2004], at para 38.
[34] *Mitchell v. M.N.R*., [2001] 1 S.C.R. 911, 2001 SCC 3, at para. 127-129.

assertion [sovereignty of Crown over First Nations] arose an obligation to treat aboriginal peoples fairly and honorably, and to protect them from exploitation."

Thus are we able to say that section 91 of the *Constitution*, read together with section 35(1) with regard to First Nations, means that federal powers under honourable governance should be read as the ability of the Federal Government to take action to preserve and promote Aboriginal sovereignty and treaty governance, to fulfil its fiduciary obligations and honour the Treaty nations.

As for Provincial powers under honourable governance, section 92 and 109 do not provide explicitly constitutional authority to deal directly with Indians, especially treaty Indians. Treaty rights are a constitutional interest outside of the lands belonging to the Provinces under NRTA that limits their authority. Treaty right are a burden that runs with the ceded treaty land under provincial governments.

Now, if we go back to the provision integrated into the Victorian Treaties, there is no fair and honourable purchase, therefore the Crown only acquired a conditional treaty interest in the aboriginal lands that was transferred and surrendered. This creates a whole new dilemma with the treaty which elaborated obligations for the Crown and the Federal Government to fulfil with regard to the purchase of the land (including the payment of nullities, etc.). There was never a clear purchase by the Imperial Crown and the Federal Government of the Aboriginal tenure. That created the dilemma about treaty tenure rights. These are constitutional documents because the land was never purchased from First Nations, and that is why they still have a continued and contingent right to land on constitutional and international level.

These are the constitutional and legal frameworks that should guide the testing of the consistency of the *Indian Act* with the constitutional provisions and principles. If the later does not comply with this constitutional framework, we should ask the Supreme Court of Canada to render it unconstitutional and with no effect.

INTERVENTION: In your opinion, are there any limitations for First Nations in their taxation powers with regard to the ceded lands?

INTERVENTION: There are some limitations with regard to taxation powers in both First Nations law, but these limitations are not in the Treaty. The Treaty is silent on taxation, which means that the Crown was not delegated any authority to tax treaty First Nations. Because the Crown assumes mainly a derivation power from the Treaty, and it has no explicit taxation power which derivates from a Treaty, the Crown needs a delegation from the aboriginal sovereigns to empower them to tax. This is one of the key differences between Treaty nations and Canadians.

INTERVENTION: Is there any existing manner to render a Treaty null and void for non fulfillment by Crown of treaty obligations?

INTERVENTION: If there is no compliance, the lands should then revert back to the aboriginal Chiefs and this could create a huge crisis in Canada. Two theories exist with regard to treaty extinguishment. The first theory explains that both consent of the Crown and the First Nations is needed for the extinguishment of any treaty and the second one says that the Crown can do it unilaterally by a constitutional amendment prior to 1982, for example the *Constitution Act*, 1930 modification of Treaty 8 hunting provisions. Section 52(1) of the *Constitution Act*, 1982 provides that any legislation that attempt to unilaterally extinguish a treaty's rights is invalid.

THE EFFECTS OF LEGAL INSTITUTIONS ON ACCESS TO CREDIT: EVIDENCE FROM AMERICAN INDIAN RESERVATIONS

MR. DOMINIC P. PARKER
RESEARCH ASSOCIATE
&
PROFESSOR TERRY L. ANDERSON

DIRECTOR PROPERTY AND ENVIRONMENTAL RESEARCH CENTER (PERC)
UNITED STATES

CALGARY, FEBRUARY 23, 2009

1- LIMIT ON TRIBAL SOVEREIGNTY

In the famous Supreme Court of United States case *Cherokee Nation* v. *Georgia*, 1831[35], Court Justice Chief Marshall set up an important governing rule which declared that tribes and reservations were "domestic dependant nations of the U.S.". This doctrine formulated that tribes could set or enforce laws unless the U.S. Government exercised the guardianship role that it assumed.

Some decades later, in 1885, the tribal sovereignty was limited when Congress passed the *Major Crimes Act of 1885*. This *Act* gave the Federal Government authority to adjudicate and enforce major criminal offences committed on reservations. Later in 1953, another controversial piece of legislation was passed, *Public Law 280 (1953)*, which again extended state jurisdiction on reservations where states had formerly no jurisdiction. This law usurped the tribal sovereignty and many tribes feared that state officials would discriminate against Native Americans, especially with respect to criminal enforcement.

Following the previous jurisprudential and legislative changes in the United States, the presentation addresses the following questions: Will access to private credit on reservations improve if borrowers submit to the commercial laws and courts of the States surrounding these reservations? How can American Indian tribes improve access to private credit without submitting to state laws and courts?

[35] *Cherokee Nation* v. *Georgia*, 30 U.S. 1 (1831).

Before describing the study, some basic facts about American Indian reservations were presented:

- American Indians reservations are sparsely populated – only 81 of 327 federally recognized reservations - 48 states have Native American populations exceeding 1,000.

- Reservations are generally poor – in the latest decennial census the per-capita incomes for American Indians on reservations was less than US $8,000 compared to $14,000 for American Indians off reservations and about $21,000 for the broader US population. The exceptions to this poverty are a small number of sparsely populated reservations with large casinos.

- Many reservations are a mosaic of 3 basic land trusts:

    - Tribal trust land is owned by tribal governments but held in trust by the US Government. It cannot be alienated to non-tribal members without federal consent.

    - Individual trust land is owned by individuals or groups of Native Americans but held in trust by the US Government. It cannot be alienated to non-tribal members without federal consent. When an individual owner of the land dies the ownership is transferred to his or her heirs and this has led to exponential growth in the 'fractionalization' of land ownership.

    - Fee simple land is held outright by either Indians or non-Indians and can be bought and sold freely.

    - Because fee simple land can be repossessed by non-tribal lenders, it can be used as collateral on loans. Trust land cannot be repossessed, but lenders may be able to acquire a long-term leasehold interest in the land. (As an aside -- there is anecdotal evidence that the leaseholds give lenders enough security to extend mortgage loans on reservation lands but this issue has not been thoroughly studied).

    - American Indian tribes are generally sovereign, meaning that they have the authority to set and enforce laws within reservation boundaries (including some activities on fee simple land).

2. THE IMPACT OF IMPOSITION OF STATE JURISDICTION ON AMERICAN INDIANS RESERVATION

For the affected reservations, *Public Law 280* transferred jurisdiction over major crimes from the Federal Government to the States. It also transferred jurisdiction over minor crimes and civil disputes from tribal governments to States. Historical records show that the law was motivated as a measure to improve law and order on certain reservations. The transfer of civil jurisdiction, which is the focus of the study, was apparently an "afterthought".

The studies that were made show the natural log of per-capita credit from private lenders by year. Credit estimates are from all sources including home mortgages, business loans, and consumer loans. The data comparisons are of Bureau of Indian Affairs areas that were not put under state jurisdiction against the Minneapolis Area, with many reservations in this area put under state jurisdiction in 1953. Many of the reservations in the Portland area were put under state jurisdiction in 1963. In both cases there is evidence that the amount of credit spiked upward when states assumed jurisdiction. Studies also compared the home mortgage and self-employment outcomes on reservations in recent years. Results show that the credit outcomes on reservations under state jurisdiction are more favorable for borrowers.

More complex empirical analysis of home loan data were conducted to determine if the differences observed were actually caused by differences in jurisdiction or by some other confounding factors. Therefore, several characteristics of borrowers and loans and reservations were controlled to try and isolate the effects of jurisdiction.[36] Using the home loan data, the outcomes for Native Americans living just outside reservations and those for Native Americans living on reservations, were compared (and factors such as the borrowers income and the size of the loan requested were controlled.)

Following these analysis, it was found that the loan applications of Native Americans on reservations are 10.5 percentage points more likely to be denied compared to observationally similar Native Americans off reservations. And that 6.1 percentage points from this 'reservation penalty' are erased if states have

[36] These characteristics are the following:

- For Loan outcomes (Denied, approved but not originated, approved and originated; some rate spread data for originated loans)
- For Applicant characteristics (Race, Sex, income)
- For Loan characteristics (Size of loan request; loan type – purchase, improvement, refinance; property type – manufactured v. site built; occupation – owner-occupied v. tenant; lien status – first lien, subordinate lien, no lien; government backed – insured, guaranteed
- For Census tract characteristics (Reservation characteristics; energy, amenities, land ownership, remoteness, acculturation, gambling, etc.)

jurisdiction over debt contracts. Also, some related evidence found indicates that Native Americans on reservations under tribal courts are charged higher interest rates than Native Americans on reservations under state courts. (These interest rates are on loans that are offered and accepted). In addition, some other evidences were found that Native Americans on reservations under tribal courts are more likely to turn down offered loans. This is presumably because the loans being offered are at unacceptably high interest rates. [37]

In summary there is evidence that submitting to state courts can improve access to credit. However, tribes are understandably reluctant to yield their sovereignty to states. Therefore, they have been pursuing some alternatives that enable them to make their tribal codes, laws, and rulings more transparent and accessible (some are posting these on tribal court clearinghouse websites). They are also in the process of forming inter-tribal courts. All these efforts should improve access to credit to the extent that the alternatives decrease lender uncertainty about lending under tribal jurisdiction. More research is needed on this topic.

[37] Data on the interest rates charged on offered but not accepted loans are not available.

SHORT OVERVIEW OF THE LAND TENURE SYSTEM IN SOUTH SUDAN AND INSTITUTIONAL CONSIDERATIONS

NICHOLAS OLIVIER
DIRECTOR

SADC CENTRE FOR LAND-RELATED, REGIONAL AND DEVELOPMENT LAW AND POLICY (CLRDP)

UNIVERSITY OF PRETORIA
SOUTH AFRICA

VANCOUVER, MARCH 3, 2009

Sudan was unified in the late 1950's. Prior to that, there were three Sudanese territories, managed by the British Government as separate entities. There was Northern Sudan, with Khartoum as capital, predominantly populated by Arab speakers. Southern Sudan is populated by black Africans which are basically 80 % Christians, 8% traditional African religion and 10% Muslims. The third one was the Kingdom of the Fur people, or Darfur as it is said today, black people professing the Muslim faith. The British Government then reunited these three regions into one country. The most important political group was in Khartoum. There are three distinct and separate administrations for each region but Khartoum managed the whole country.

ROOTS OF A LONG LASTING CONFLICT

For a period of nearly 22 years (1983 - 2005)[38], there was a war between the Khartoum Government and Southern Sudan which established a liberation movement and army SPLM/A (Sudan People Liberation Movement/ Army). This war resulted in millions of internally displaced and killed people. The North-South war ended formally in 2005 with the signature of the Comprehensive Peace Agreement (CPA) which integrated the SPLM/A into a Government of National Unity (GNU). The CPA was signed also by the United Nations, the Arab League, the European Union, China and Russia. It is now an international agreement overseen by the United Nations Mission in Sudan (UNMIS).

[38] For further background information on Sudan and the evolution of its political history see: International Crisis Group at http://www.crisisgroup.org/home/index.cfm?id=1230&l=1. Articles on the Comprehensive Peace Agreement (CPA) can be also found.

The major aim of the CPA is to govern relations between Khartoum and Southern Sudan. The CPA also opened the way to two other peace agreements signed in 2006 between Khartoum and the Eastern part of Sudan and Darfur. Canada is significantly involved in all Sudan by supporting the establishment of institutions for the implementation of the CPA, notably in Southern Sudan. The case of Southern Sudan is specific. The CPA provided certain powers and functions to the Southern Sudan Government. These powers are not delegated powers from the Khartoum Government but derivate from the application of the CPA. These powers provide the establishment of an interim government in Southern Sudan for a period of 5 years (2005 – end of 2009). At the end of this period elections should take place and, by the end of 2011, a referendum should determine whether Southern Sudanese still want to maintain an autonomous region, or if they revert back their political powers to Khartoum and form a unitary government, or if they want to become an independent country.

The roots underlying the North-South conflict are directly related to the control of land and natural resources. More than 70% of all Sudan oil and natural resources are located in South Sudan. Nearly 80 % of Sudan oil is exported to China.

The CPA also provided for the establishment of a national *Constitution* for all Sudan. This *Constitution* was passed on the 9th of May 2005 and is basically administered by Khartoum, and provided for the creation of a unitary government including representatives of the previous Khartoum Government and also some representative of the Southern region. On the 5th of December 2005, the CPA provisions permitted the adoption of an Interim *Constitution* in Southern Sudan permitting the creation of the Interim Government of Southern Sudan.

Despite the fact that the CPA provided disposition to establish agreements between Khartoum and Southern Sudan regarding the management and the sharing of natural resources, the parties did not come to an accord. The CPA provided also for the establishment of a national Land Commission which has not been established yet. In addition, it also supported the implementation of a Southern Sudan Land Commission which was established in 2006.

LAND REGISTRATION PROCESS

In 1925, when Khartoum was a separate protectorate, the British administration passed the *Resolution of Dispute and Registration of Land Act* which provided for the registration and the survey of Sudan Lands, in the name of individuals and in the name of the Crown (which excluded at that time the Southern part of Sudan). In the 1970's, the Khartoum Government, which was then forming a unitary government, passed legislation to register all unregistered rural lands all over Sudan. That meant that the Central Government could take any decision regarding these lands (displacing people, making private investment, etc.).

This is one of the main issues underlining the conflict in Sudan. In response to these problems related to the control and management of lands in South Sudan, the Council of Ministers of South Sudan passed the *Southern Sudan Land Act* in December 2008, which was signed by the President (after having been approved by the Southern Sudan Assembly) on 16 of February 2009.

The *Act* deals with a number of issues. The right to land and the land itself shall be owned by the Government of Southern Sudan, by the states and by the communities within the boundaries of Southern Sudan. The *Act* also discusses the right of foreigners to lease land. The land administration is a concurrent competence shared between the States and the Government of Southern Sudan, with the obligation to consult with rural communities. The role of the community council is to formulate its own rules to manage the land in harmony with the interim *Constitution*.

COMMUNAL LAND RIGHTS ACT 11 OF 2004: OVERVIEW WITH SPECIAL REFERENCE TO CONTEXT OF LAND REFORM, INSTITUTIONAL ARRANGMENT AND IMPLEMENTATION

NIC OLIVIER
DIRECTOR

SDAC CENTRE FOR LAND-RELATED, REGIONAL AND DEVELOPMENT LAW AND POLICY (CLRDP)

UNIVERSITY OF PRETORIA
SOUTH AFRICA

VANCOUVER, MARCH 3, 2009

The presentation began by stating two important principals that are central to understanding South Africa's political context. First, political decisions by leaders after the apartheid regime stated that there are no indigenous or first nations in Africa. Every citizen has always been and remains an African. The second non-negotiable principle says that no colonial boundaries could be changed.

The African Human Rights Commission has said that there are some indigenous people in Africa who could be defined as a small, marginalized and vulnerable group who have occupied the territory since immemorial times. South Africa have five of these vulnerable groups, which represents around 300 000 people. They are referred to as the Khoisan community. In 1998, a policy process was initiated in South Africa to recognize the Khoisan elected leadership similarly to the identity leadership assumed in traditional African communities. In 2006, the Government has taken some steps forward to work on the governance level of this policy and pushed forward to recognizing the cultural background of the Khoisan groups.

THE CONTEXT OF LAND REFORM

One of the common characteristics of the postcolonial developing world is the existence of immensely skewed land distribution patterns, with, in many countries, the majority (and in some countries, a significant minority) of the population occupying traditional communal areas which are characterised by

- the absence of any meaningful, and legally protected, rights
- the remnants of discriminatory land administration systems
- subsistence farming,
- very high levels of poverty
- male absenteeism
- lack of developmental opportunities
- weak local government
- low levels of provision of basic services (infrastructural, social and others, e.g. potable water and sanitation)
- lack of cooperation between elected and local government structures

For the socio-economic development of these communities in the developing world there is a pressing need to take affirmative steps to

- bring about equality
- address massive poverty
- provide food security
- create space for the full recognition, protection and enhancement of human dignity
- address gender inequality
- effect sustainable livelihoods

South Africa has initiated a series of programmes which are described as the following:

- Restitution program: Restoring land to the descendants of communities and individuals who had been removed from ancestral land in terms of colonial and apartheid legislation

- Redistribution program: Providing Government subsidized access to commercial agricultural land to emerging black farmers who in the past were excluded from acquiring such land on account of colonial and apartheid legislation

- Tenure reform program - consisting of four parts:

    - The conversion of colonial and post-colonial permits and less secure rights in urban areas to ownership and other forms of secure rights

    - The improvement of security of title in respect of, as well as the regulation of access to and the management of, the so-called

Coloured Rural Areas (in terms of the *Transformation of Certain Rural Areas Act 94* of 1998)

- The allocation and protection of tenure rights of different categories of farm workers

- The transformation of communal tenure by the

  - transfer of communal areas occupied by traditional communities to the communities concerned (currently registered in the name of the RSA Government and held in trust by the RSA Government in trust for the said communities), and

  - conversion of individual community members' weak and insecure old order rights into registerable, secure and bankable new order rights.

Although these three land reform programs (restitution, redistribution and tenure reform) differ with regard to their origin and focus, they do have a number of key aspects in common. One of the most important common denominators is the need for a comprehensive support program. At present there is no such generally applicable support program (which focuses on the self-sustaining development of the land reform beneficiary communities concerned) dealing with cross-cutting issues affecting the three pillars of land reform. It is nonetheless important to underline that the actual government supports and recognizes the traditional governance structure and encourages the formation of local land administration committee for the management of the lands.

CURRENT STATUS QUO OF LAND REFORM (2009)

The Restitution Program involves the transfer of both urban land and rural (primarily commercial agricultural) land[39]. The vast majority of urban land claims have been dealt with. However, a significant number of complex rural claims must still be finalized. It is estimated that these rural claims might involve 2 000 to 4 000 commercially active farms. At present there is no comprehensive support strategy nor any coordinating structure (as well as monitoring and evaluation systems) in place – not at national, provincial or project level.

[39] The detailed regulatory framework is found in the Restitution of Land Rights Act 22 of 1994, which provides for a detailed process for the submission, consideration, validation and recognition of claims, the determination of the appropriate approach (restoration, alternative land and/or monetary compensation), and the legal and actual transfer of the land in question to beneficiaries (if applicable).

As for the Redistribution Program, it aims at the transfer of commercial agricultural land to emerging black farmers (which in some instances include national and provincial state owned farms). It is intended that at least 30% of remaining agricultural land (that has not been transferred in terms of the Restitution Program) will be transferred between 2005 and 2014 to emerging black farmers. At present there is no comprehensive support strategy nor any coordinating structure (as well as monitoring and evaluation systems) in place – not at national, provincial or project level. The same need for the coordinated implementation (after transfer to the beneficiaries), monitoring and evaluation of a comprehensive and all encompassing post-settlement program exists in the case of the Redistribution Program.

The Communal Tenure Reform Program has the objective of transferring in full ownership the communal areas in South Africa to the traditional communities concerned. In addition, the conversion of their weak and insecure rights will soon start as the *Communal Land Rights Act* of 2004 (*CLARA*) is to be promulgated soon (currently subject to a constitutional challenge). At present there are approximately 800 officially recognized traditional communities in South Africa (and approximately 296 in KwaZulu-Natal). Those communities are by and large located in the 10 former homelands. The following levels of traditional leadership are recognized:

- 12 Kingships (hereditary)
- Senior traditional leaders (for each of the approx. 800 traditional communities) (hereditary)
- Headmen and headwomen (hereditary, and in a few instances, elected)[40]

As land is a national competency (or functional domain), the national Department of Land Affairs is responsible for policy formulation, drafting of legislation and implementation. In a limited number of instances, delegations have been put into effect to a combined national-provincial entity in KwaZulu-Natal, the Ingonyama Trust. Thus, in KwaZulu-Natal, the Ingonyama Trust Board (which will be renamed as the KwaZulu-Natal Land Rights Board) is an important role player in

[40] Each community has an officially recognized (and established by law) traditional council (previously referred to as tribal authority, and, subsequently, traditional authority): 60% traditional/customary; 40% elected (by commoners for commoners); 1/3 overarching female membership. Inherent customary roles and functions; compulsory advisory role; allocation of roles and functions (on behalf of national and provincial spheres); partnership arrangements between traditional councils and municipalities. The statutory structures for liaison with the three spheres of government can be described as follows: * National House of Traditional Leaders (national sphere); * Provincial Houses of Traditional Leaders (provincial sphere); * Local Houses of Traditional Leaders (local sphere). Traditional communities' governance is the responsibility of the national Department of Provincial and Local Government. A new national Department of Traditional Affairs has been established in the course of 2009. Furthermore, traditional courts, applying customary law in civil cases, and limited criminal jurisdiction (western law), continue to operate (National Department of Justice).

the implementation of CLARA. At present there is no comprehensive support strategy nor any coordinating structure (as well as monitoring and evaluation systems) in place – not at national, provincial or project level.

Steps will have to be taken before transfer, by the RSA Government, of the ownership of the land in question to the communities concerned. These steps involve some rights enquiries and surveying of the outer boundaries of each traditional community area. They also include research into current land use patterns and the determination of the development potential of each of these areas (which also includes the drafting of land use and development plans).

After transfer of ownership, the communities will have a choice of: Maintaining a system of (strengthened) communal tenure; transferring the total area concerned to individual community members by means of rights less than ownership (or part thereof, whilst maintaining the remainder in communal tenure); or subdividing the total area (or parts thereof) and transferring such subdivided areas to individual community members by means of rights less than ownership. Any specific, or all such individualized land parcel(s), may thereafter, if the community concerned were to approve, in each individual entity, be converted into full (western type) ownership (which may thereafter be transferred, without any community involvement or approval, to any third party – which may also be a non – community member).

COMMUNAL LAND RIGHTS ACT 11 OF 2004

The *Act* touches different aspect of governance and relationship with the traditional leaders and local government (municipalities). It also provide for the termination of trusteeship of State. The State will have to divest itself of the trusteeship of the land so that land is transferred to the community in title. The outer boundary will be in the name of the community, but the individual community members will hold various types of new order rights.

THE SEVEN KEYS IMPLEMENTATION STEPS OF CLARA

1. Framework determination:

    - Determination of policy framework, legislative framework, regulatory framework, institutional framework, status of land registers (if any).

2. Status Quo Report (including Land Rights Enquiry and Baseline Survey):

    - Categories of land parcels
    - Current rights and interests
    - Disputes and competing claims

- Types of rights and/or interests
- Community base line surveys
- Governance (internal and external) base line surveys
- Current land use(s)
- Future land uses (potential of land (with regard to natural resources and their potential sustainable use in order to benefit communities in a sustained manner)

3. Drafting of an integrated, co-ordinated and all encompassing Business Plan (Land Use and Development Plan - LUDP) for each individual community area.

4. Establishment of statutory structures (especially Land Administration Committees and drafting of their constitutions).

5. Transfer of ownership to communities.

6. Determination by communities of options of land rights or combinations thereof.

7. Self-sustaining development of traditional community areas (including implementation, co-ordination, monitoring and evaluation, reporting and intervention).

KEY CHALLENGES

1. Need for final subordinate legislation
2. Implementation plan for CLARA Program
3. Project level: Land use and development plans
4. Pre-transfer implementation manual
5. Post-transfer support manual
6. Funding
7. Availability of officials and service providers
8. Training of officials and service providers
9. Roles of, and relationships between:
    - Department of Land Affairs
    - National Department of Agriculture
    - Provincial Government departments
    - Local government
    - Kwazulu-Natal Ingonyama Trust (Chapter 9 ss 31-35)
    - New style traditional governance structures (Traditional Councils and Traditional leaders)

- Land Rights Boards
- Land Administration Committees

10. Governance: Need for coordination:

    - Coordinating structures (national, provincial and project level)
    - Need for monitoring and evaluation (including impact assessment), reporting and intervention at programme level and project level.

11. Social facilitation (dispute resolution between communities and within communities).

12. Impact on, and relationship with, national, provincial and local development priorities:

    - Poverty Alleviation, Sustainable Livelihoods and Food Security programmes, etc.
    - LED (Local Economic Development) Programmes
    - Provincial Growth and Development Strategies
    - District municipalities' IDPs (Integrated Development Programmes) and local municipalities' IDPs
    - Impact on related strategic government programmes, e.g. water rights and forestry management

13. Impact on local government:

    - Implications of local government: *Property Rates Act 6* of 2004
    - Implications of s 37 CLARA:
        - Provision of municipal services and development of infrastructures on communal land
    - Local and district municipalities' IDPs (Integrated Development Programmes) to be aligned

    - All programmes, projects and funding, as well as infrastructural and human resources, to be aligned
    - Status Quo Report (rights enquiry and baseline survey) will serve as a management tool for:

- The communities, to better understand the *Act* and their role in the ownership of the land
- The LED (Local Economic Development) and IDP (Integrated Development Programme) offices within local and district municipalities, to determine where various projects should and could be located, as well as the social, economic and tenure implications the *Act* will have on the expansion of existing and creation of new projects
- Research to be done to determine:
    1. The implications for the communities concerned
    2. The implications for access to natural resources by individual community members
    3. The implications for any development projects focussing on the sustainable use of natural resources undertaken on the land that might be privatised
    4. The implications for future development of the municipalities concerned and for the operations of their LED Departments.

In conclusion, the above overview underscores the need for a comprehensive support strategy that would deal with all issues relating to both the sustainable improvement in quality of life of beneficiaries in terms of the Tenure Reform Program, and the sustainable development and effective utilization of the land and related natural resources concerned. This represents a major challenge that needs to be addressed urgently by:

- Key role players within the national sphere of government (e.g. the regional offices of the Department of Land Affairs and the Department of Labour)
- The Provincial Governments concerned (both as coordinating and implementation institutions)
- Relevant district and local municipalities
- Other governance stakeholder institutions (e.g. the KwaZulu-Natal Land Rights Board)
- Internal community governance structures (elected, officially recognized traditional institutions, traditional institutions that are not officially recognized)

- Civil society entities (e.g. organized agriculture)

These government institutions – with the Provincial Government being the lead support institution – have to coordinate and implement (as well as monitor and evaluate) a comprehensive and all encompassing pre- and post-transfer support program which would have its main objectives:

- Sustained security of tenure
- Sustained improvement in quality of life
- Poverty reduction
- Food security
- Agricultural production, as well as
- Economic development of the community area concerned

The above framework indicates the necessity to specify the role and functions of the key role players, including that of Traditional Councils.

At the Provincial Government level the following three departments are of crucial importance:

- The Premier's Office in its constitutionally prescribed coordinating role
- The provincial Department of Agriculture, taking into account its pivotal role as the initiator and driver of sustainable development within the agricultural, environmental, nature conservation and related fields
- The provincial Department of Local Government, which has a support and supervisory role as regards local and district municipalities

WORKING GROUP MEETING ON INDIGENOUS LAND TITLE SYSTEMS

FINAL REPORT

MONTRÉAL, SEPTEMBER 9-10, 2009

EXECUTIVE SUMMARY:
THIRD EXPERTS' ADVICE SESSION

The third experts' session gathered the same experts and main drafters of legislation. This meeting was an opportunity to further discuss fundamental differences between deeds registry systems and Torrens registry systems. Advantages and inconvenient of the respective systems were presented in relation with the alleviation of economic disparities between First Nations` land and non-First Nations' land.

It was also a prospect to work further on the *First Nations Property Ownership Act* (*FNPOA*) and to analyse details pertaining to First Nations' proprietary issues and some constitutional issues.

Prior to these discussions, the Institute on Liberty and Democracy (ILD) presented some of the main lessons learned and proposed reforms to capitalize indigenous communities' lands in Peru.

It was also an opportunity for ILD to share a successful story related to the signing of a Memorandum of Understanding between ILD and the First Nations Tax Commission (FNTC).

THE CAPITALIZATION OF INDIGENOUS COMMUNITY LAND: LESSONS LEARNED AND PROPOSED REFORMS

MARIA DEL CARMEN DELGADO
INSTITUTE ON LIBERTY AND DEMOCRACY (ILD)
PERU

MONTRÉAL, SEPTEMBER 9, 2009

The high incidence of extra legality throughout the developing world suggests that exclusion is a significant problem, and one that merits special attention. According to the Final Report of the Commission on Legal Empowerment of the Poor, at least four billion people (70% of the world's population) are excluded from the rule of law. As denizens of the extralegal world, the majority of indigenous communities are victims of this exclusion, leading their everyday lives on the fringes of the legal system and what protection it affords, and excluded from the benefits of a modern and inclusive economy.

Indigenous people represent 30 to 40% of the whole Peruvian population and occupy at least 25% of the national territory. Most indigenous people are organized in indigenous communities. There are 7,563 indigenous communities officially recognized in Peru: 80% are located on the Peruvian Coast and in the High Lands (*The Peasant Communities*), and 20% are located in the Peruvian Amazon Basin (*The Native Communities*).

Major constitutional reforms designed to recognize the identity, customary laws and land property rights of indigenous communities were initiated in the early 1990s.[41] The Constitution of 1993 [articles 89 and 149] guarantees respect for the cultural identity of indigenous communities and acknowledges their right to exercise jurisdictional functions within their territory according to customary law- as long as the fundamental rights of the individuals are not violated. In addition, it recognizes the legal existence of indigenous communities and provides them with moral person status [article 89]. Regarding their land tenure system, the Constitution [articles 88 and 89] acknowledges the land property rights of indigenous communities, as well as their right to transfer ownership rights to

[41] In 1994 Peru subscribed the ILO Convention No. 169 on Indigenous and Tribal Peoples adopted in 1989, and recently the UN Declaration on the Rights of Indigenous People of 2007.

community and non-community members, allocate other interests, and decide on the economic use of their lands – communities for instance are able to sell, rent, lease and mortgage their lands. Additionally, it rules that the land rights of indigenous communities are not subject to prescription (adverse possession) and that these rights may only be extinguished if the land is abandoned. The land property rights of indigenous communities do not include natural resources - such as minerals, hydrocarbons and forest resources - located in their territory, due to the fact that, according to the Constitution, these resources belong to the Peruvian Nation and only the State is empowered to grant concessions for their use and economic exploitation [article 66].

According to official data, over 80% of the legally recognized Peruvian indigenous communities have received land titles that have been recorded in the Property Registry. Peasant communities have received ownership titles, and Native communities have received ownership titles over agricultural lands (which represent some 60% of their territory) and usufruct rights on forest lands (which represent the remaining 40%).

Legal recognition of their property rights allowed certain communities to capitalize on their lands and improve the economic well-being of community members. However communities with success stories are still in the minority, which is primarily due to: Non-demarcated lands and inaccurate maps; multiple registered owners with title over the same piece of land; and registered properties with overlapping boundaries – provoking numerous and frequent boundary disputes; numerous community and non-community members lack titles over the land parcels that they hold individually - unrecorded mandates of the communities legal representatives and unregistered bylaws, and deficiencies in the decision making processes; unclear and unarticulated rules and procedures for the use and exploitation of indigenous communities' lands, particularly for granting of forestry, mining and hydrocarbon concessions; and lack of public awareness campaigns, adequate consultation mechanisms and consensus-building strategies, which have provoked serious conflicts between the Peruvian Government and most Native communities during the last years.

A) Main lessons learned and proposed reforms to capitalize indigenous communities' land rights

1) Efficient legal mechanisms and simplified procedures to formalize and register all types of existing interests over indigenous communities' lands.

Main problems to be solved:

- Lack of legal mechanisms to recognize, regularize and register property and usufruct rights over the different kinds of lands within the

territory of indigenous communities – i.e. agricultural, forest and barren lands, pastoralist and village areas.

- Governments have focused mainly on facilitating property formalization in non indigenous community lands and granting and recording timber, mining, lands and hydrocarbons concessions, all over the country.

2) Institutional reforms built on those extralegal practices/arrangements that the majority of indigenous communities identify with and respect, and standards to document said practices - a bottom-up approach.

Main problems to be solved:

- Failure of most legal systems to incorporate customary norms and extralegal practices – top-down approaches only.

- Lack of simplified legal procedures to prove existing land rights and absence of standards to document decisions and transactions over land.

- Customary norms and arrangements cannot be enforced beyond the territory of the communities.

3) Empowering indigenous communities to exercise ownership rights over their lands, allowing them to choose the kind of tenure regime that most suits their needs and interests – individual, collective or mixed. They should also be able to sell, rent and mortgage their lands and grant different kind of interests – clear statutes on the nature, extent and restrictions of ownership rights and other interests on indigenous lands are needed.

Main problems to be solved:

- Imposition of land tenure systems – collective or individual - and unjustified restrictions for the economic use of property. (All Latin America countries – excluding Brazil – have granted land property rights to their indigenous communities, but only Peru and Mexico have empowered them to choose the kind of tenure regime that most suits their interests and needs).

4) Legal mechanisms to facilitate indigenous communities´ access to business organizational forms – i.e. corporate bodies - that would allow them to develop business activities and build reliable and productive links with the private and public sector.

Main problems to be solved:

- Lack of adequate organizational forms to carry out business activities, encourage private investment and operate in expanded markets.

- Cumbersome and expensive procedures to create corporate bodies and obtain limited liability.

- Lack of information systems to access reliable and updated information regarding:

  - Main assets and business activities of indigenous communities and their members
  - The organization and legal representatives of the communities

- Absence of mechanisms to facilitate access to formal credit.

5) Simplified and low-cost mechanisms to accredit indigenous communities legal existence, register the mandate of their representatives and document their bylaws.

Main problems to be solved:

- Cumbersome and expensive mechanisms:

  - In the case of Peru, before the 1990s reforms, regularizing indigenous communities land tittles could take five to six decades, mainly due to difficulties in accrediting the legal mandate of community representatives;

  - Despite the legal reforms, registration procedures are still costly, and designated representatives and bylaws of most communities remain unregistered, so their decisions are not enforceable against third parties

6) Efficient legal mechanisms to deal with undocumented land holders

Main problems to be solved:

- Complicated, costly and insecure mechanisms to identify land holders are major obstacles for property adjudication and registration:

  - Most land holders in Latin America lack IDs or hold invalid or defective IDs (unregistered, mistaken or fake).

- Procedures to register births and get IDs are usually cumbersome and costly, and most identification and civil status registries fail to provide legal security,
- Most civil status registries destroyed during times of political violence have not been reconstructed.

7) Simplified and low-cost out-of court mechanisms to solve boundary disputes and conflicts among competing interests on lands – including administrative procedures, conciliation, arbitration and any other ADRs.

Main problems to be solved:

• Numerous and frequent conflicts between competing interests over lands, and lack of low-cost and simplified mechanisms to solve disputes:

- Nearly 60% of indigenous communities in the Peruvian Coast and the High Lands are involved in boundary disputes with other communities and third parties.

8) Simplified and democratic decision making processes within indigenous communities to grant interests on their lands and make decisions on economic use.

Main problems to be solved:

• Deficiencies in the decision making processes:

- Discriminatory practices against women and non-community members holding interests on community lands
- Outdated records of community members
- Complicated procedures and excessive quorum to take and document decisions
- Lack of advice and up-to-date information prior to decision making
- Lack of laws and regulations written in local languages.

9) Effective, secure and accessible land registration systems unified and standardized registration rules and techniques, low-cost procedures for first registration and recording of subsequent transactions over lands.

Main problems to be solved:

• Long and costly registration procedures and ineffective, insecure and non-accessible registration systems:

- Failure to provide certainty on registered rights
- Lack of geographical data base - unable to avoid multiplicity of registered owners over the same property and superposition of areas regarding registered properties
- Failure to prevent deterioration, lost or destruction of public records
- Lack of mechanisms to prevent fraudulent transactions
- Lack of simplified mechanisms to access information and records.

10) Accurate and reliable information on territorial limits and standardized and low cost survey methods low-methods. Information and communication technology decisions require significant attention; they should be seen as means to an end not as ends in themselves end.

Main problems to be solved:

- Inaccurate, outdated and unreliable information on territorial limits, and complicate and costly surveying activities:

  - Non-demarcated lands or outdated surveys
  - Inadequate, standards for surveying
  - Obsolete systems of measurement: Maps used to demarcate lands lack *Universal Transversal Mercator (*UTM) geo-referencing
  - Land surveying and computerization of land records are often independent as a strategy in its own right institutional reforms and re-engineering processes. In most cases, technology has been pushed forward regardless of capability and needs.

11) An integral strategy for the capitalization of indigenous communities´ land rights and a coherent policy to harmonize all reform programs.

Main problems to be solved:

- Lack of an integral strategy.

12) Appropriate institutional mechanisms to guarantee the rights of indigenous communities to consultation and compensation for the use and exploitation of their lands, and reasonable and realistic standards for environmental impact assessment

Main problems to be solved:

- Lack of appropriate mechanisms.

13) Public awareness campaigns and legal mechanisms for building consensus regarding the main reforms, and adequate feedback mechanisms.

Main problems to be solved:

- Absence of consensus-building strategies and public awareness campaigns to garner support towards the approval of required reforms, and lack of adequate feedback mechanisms to improve and adapt the reforms:
    - This circumstance has provoked serious conflicts between the Peruvian Government and most indigenous communities.

Building a new legal system for legally empowering indigenous communities is a major challenge. The reform agenda for any country seeking to provide indigenous communities with efficient legal mechanisms to facilitate their transition towards a modern and inclusive market economy should be comprehensive and innovative.

Public awareness campaigns, consensus-building strategies, maximum community participation and wide publicity are crucial in order to attain the reform goals. It has been demonstrated that consensus-building strategies among beneficiaries and main stakeholders are indispensable for overcoming any resistance and facilitating the approval of the required legal reforms. It is also necessary to keep the beneficiaries of the reform program fully involved during the whole process. Beneficiaries should also be empowered to monitor the results of reform programs during the implementation phase. It is important as well to disseminate the main achievements, highlight the participation of the main stakeholders and demonstrate a high political leadership when implementing the reform.

Taking into account that the institutional reform process is “a learning by doing” process, feedback mechanisms to improve the reforms and adapt them to new circumstances are also fundamental elements during the implementation phase.
Thus, this third experts` session has been also an occasion to discuss the signature of a Memorandum of Understanding between the Institute on Liberty and Democracy and the First Nations Tax Commission in Tarapoto, Peru. Through this MOU, both institutions have committed to work together to secure resources and to promote, develop and implement markets that are compatible with indigenous values and rights.

BEST PRACTICES IN FIRST NATIONS` LAND ADMINISTRATION SYSTEMS
&
SOME CONSTITUTIONAL ASPECTS OF THE *FIRST NATIONS PROPERTY OWNERSHIP ACT* (FNPOA)

MR. GRAHAM MATTHEWS
PARTNER
LANG MICHENER LLP
CANADA

MONTRÉAL, SEPTEMBER 10, 2009

The presentation began by discussing the current *Indian Act* Land system. The discussion focused on differences between a Torrens Registry system and a Deeds Registry system, and their respective characteristics. Exchanges also covered slightly some constitutional aspects of the First Nations Property Ownership Act (FNPOA).

LANDS UNDER THE INDIAN ACT

One of the federal government's central focuses, with respect to the management of land under the Indian Act is the reserve system. Section 18 of the Indian Act provides that reserve lands are held by Her Majesty for the use and benefit of the respective First Nation bands for which they were set apart. In other words, a reserve is an actual area of land that has been specifically set aside for the use and benefit of a particular First Nation band. Reserve lands cannot be mortgaged, pledged or charged to any person other than a First Nation member or a First Nation band.

DEFICIENCIES IN THE INDIAN ACT

The land administration system provided by the Indian Act and related legislation suffers from a number of significant drawbacks which were the focus of discussions. First, it provides for ineffective land registries. Second it does not permit transfer of freehold interests in land. Third, it splits the legal and beneficial ownership of the freehold interest and creates a double administrative layer in respect of land dealings. Fourth, it utilizes tenures with reduced marketability.

Last, it does not require surveys for all relevant interests in land. Each of these deficiencies is discussed in greater detail below.

Ineffective Registries

The Indian Act creates a number of separate title registries all coming under the general heading of Reserve Lands Register. As the Reserve Land Register is essentially a modified deeds registry system, it fails to provide certainty of title, a result common to all deeds registry systems. Although copies of all agreements creating, transferring and otherwise affecting the ownership and possession of rights in surrendered and designated lands are required to be registered at the SDLR, there is no guarantee that such registered documents are valid. Any defective or fraudulent documents, even though they have been accepted for registration, are invalid to transfer or deal with an interest in surrendered and designated lands. Furthermore, all documents that affect a parcel of land that are registered after a defective or fraudulent document are subject to the same defect and a person could be deprived of his/her interest in land due to a defect in title that arose, or a fraud that occurred, years (and several transfers) earlier.

The result is that one cannot rely to any great degree on the register to ascertain title to interests that are registered under the Reserve Land Register. For these reasons, it is common practice in most deeds registration jurisdictions that a detailed review of the register be conducted in order to check the root of title. In addition, many purchasers will obtain title insurance to ensure good title. However, title insurance only compensates a person financially for the loss suffered from fraud or defect in title; it is not able to rectify the person's rights in the land.

In Contrast to the Indian Act deeds registry, most provinces in Canada utilize a Torrens system of title registration. The principle elements of Torrens registry systems are (1) registration requirements; (2) certainty of title; and (3) a system of priorities for ranking competing interests.

Under the Torrens system, indefeasible title is established when the documents that transfer legal ownership are filed in the land registry office. Registering these documents has the effect of passing the estate or interest in land and failure to register means that an interest cannot be enforced against a third party. The act of registration guarantees the registered owner title to the land unless they participated in a fraud. The result is that a person who is dealing with land is entitled to rely on the register to determine the validity of a person's title to land. Torrens systems also create a priority system for ranking competing interests in land based on who registers first. These elements serve two related functions: determining the ordering of rights, and assisting vendors of land or holders of interests in land to demonstrate a valid title. In addition, typical Torrens legislation establishes an assurance fund to compensate persons who are

deprived of title to land (primarily by way of fraud). In comparison to deeds registries such as the Indian Act Registry, Torrens Registries are much more efficient in facilitating dealings in lands.

Non-Transferable Freehold Interests and Restrictions on Seizure

As reserve land is held by the Crown on behalf of First Nations, First Nations are not able to hold a freehold interest in their reserve lands, and title to such land may not be transferred to non-First Nations, (unless such land has been absolutely surrendered by a First Nation band, in which case it ceases to be reserve land). In addition, Reserve lands cannot be mortgaged, pledged or charged to any person other than a First Nation member or a First Nation band. These restrictions on transfers and mortgaging effectively ties up the capital of First Nations and does not permit them the full access to capital that would be permitted by an otherwise free market.

Splitting of the Legal and Beneficial Title and Double Administrative Layer

Providing that freehold interests in reserve lands are only to be held by the Crown for the use and benefit of respective First Nation bands for which they were set apart, the Indian Act not only restricts transfers of the freehold interests but divides the legal and beneficial ownership of the freehold interests between two parties: the Crown and the First Nation band. This separation of legal and beneficial title finds its foundation in the laws of equity and trust from English law. This splitting of the legal and beneficial interest between the Crown and the First Nation results in increased transaction costs by requiring that all dealings in reserve land be consented to by both the Crown and the First Nation. As a result, lessees of First Nation lands, for example, must have their leases approved by both the First Nation and the Crown, and all parties will likely require the assistance of advisors (lawyers, realtors and other business advisors) to ensure that the interests of all parties are protected under the leasing arrangement. This results in increased delays in completing leasing transactions and additional expenses.

Unmarketable Tenures

As discussed above, the market in reserve lands is limited to Certificates of Possession (CPs) and Lease. Each has significant drawbacks. The limitations on who can hold CPs and how they can be transferred effectively reduce the value of such interests compared to freehold interests in the same land. In addition, the market amongst non-First Nation members in reserve lands is affected by limitations on marketability of leasehold interests generally.

Lack of Surveys

Furthermore, the Indian Act system provides little legislative certainty as to what the survey requirements are. Thus, often with Indian Reserve lands, it is often difficult to determine with certainty where the parcel of land is located and what the boundaries are.

THE FIRST NATIONS LAND MANAGEMENT ACT

The purpose of the First Nation Land Management Act (FNLMA) is to permit First Nations to opt out of some of the Indian Act land tenure provisions and to take responsibility over both management and control of their respective reserve lands. The First Nation creates land management laws through a land code which is developed and approved solely by the First Nation and which does not require approval of the Minister.

The land affected under the FNLMA retains its status as reserve land and, as a result, continues to be held by the Crown for the use and benefit of the First Nation. In addition, land under the FNLMA remains reserve land and therefore, cannot be sold, surrendered for sale or expropriated for any provincial purpose.
The FNLMA provides the legislative framework that allows for the creation of a new system that could cure many of the problems inherent in the current Indian Act land title framework, however, it does not solve many of the key problems.
The FNLMA has done nothing to change the fact that a land code will likely only be able to aspire to the level of a good deeds registration system and not a Torrens title registration system. In addition, there is a continued prohibition on First Nations selling or mortgaging their land. Legal title to the land remains vested in the Crown, and, as in the Indian Act, the land cannot be sold, mortgaged, charged or taken through legal process. For this reason, the FNLMA does not permit First Nations to effectively utilize the capital tied up in reserve lands. Finally, non-First Nation members are restricted to leasehold interests.

FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT ACT

The First Nations Commercial and Industrial Development Act (FNCIDA) is designed to facilitate commercial and industrial development on reserve lands by narrowing the regulatory gap between the federal and provincial governments' regulatory regimes in respect of developments of reserve lands. Under FNCIDA, the federal government can referentially incorporate provincial laws that are necessary for regulating commercial and industrial developments. This creates a federal system that is comparable to existing provincial regulatory regimes. It is currently contemplated that FNCIDA could be utilized to create a land title system for reserve lands. Although theoretically possible, the main drawbacks with such an approach are the expected high costs of implementation and that the lands

would stay as reserve lands and therefore the designation and lease structure would need to be utilized for any developments.

SUMMARY OF FNPOA

The First Nations Property Ownership Act (FNPOA) has been proposed to deal with many of the deficiencies in the Indian Act, FNLMA and FNCIDA. FNPOA would provide for an effective land registry utilizing the Torrens system. It would permit transfer of freehold interests in Reserve land and remove the separation between the legal and beneficial ownership of that land. It would permit the same tenures available off-reserve utilizes tenures with reduced marketability. Finally it would require surveys for all relevant interests in land.

It is proposed that FNPOA will be optional for First Nations. If a First Nation opts to place certain lands within the proposed system, a title in fee simple will then be granted to the First Nation (or entity otherwise entitled to the fee simple interest) and registered in the FNPOA registry. If desired by the First Nation, It will then be possible for the fee simple interest to be mortgaged, sold to non-aboriginals and seized under realization proceedings. Regardless of who holds the fee simple interest, the underlying title or reversionary right will remain with the First Nation, communally. This means that if FNPOA lands become ownerless (i.e. cases where they would normally escheat to the Crown), they will revert to the First Nation instead of the provincial or federal Crown. First Nations will have jurisdiction over the lands and retain taxation rights regardless of who owned the lands, whether aboriginal or non-aboriginal.

CONSTITUTIONAL ANALYSIS OF THE FEASIBILITY OF FNPOA

It was noted that the core aspects of FNPOA necessitated constitutional analysis to ensure that it was feasible. The constitutional analysis requirement was principally driven by the fact that FNPOA is intended to be federal legislation. The constitutional discussion focused on whether the unique aspects of FNPOA are permitted pursuant to the constitutional framework. There are several unique aspects of FNPOA that require consideration. The constitutional analysis is predicated on the proprietary, jurisdictional and civil liberties frameworks and the recognition of aboriginal and treaty rights contained in the Constitution. The discussion focussed primarily on the proprietary issues.

The basic proprietary issue in respect of FNPOA is whether the fee simple interest can be conveyed first to the first nation (and subsequently to non-aboriginals if desired) under FNPOA. It is also concerned with the question of whether the First Nation can retain a reversionary right in FNPOA lands roughly equivalent to underlying Crown title. It was discussed that the treaty framework, the framework relating to reserve creation and the constitutional documents all contributed to the determination as to whether the federal Crown (together with

First Nations) alone has sufficient proprietary interests in the lands to create these interests or whether some of the requisite proprietary interests lie with the provincial Crown.

We conclude that the combination of Crown and aboriginal interest in Reserve Lands is sufficient to create the fee simple interest required for FNPOA. In this context, discussion focused on whether it is the provincial or federal Crown that holds the required Crown title.

Due to the effects of s.109 of the Constitution Act, 1867 the crown title required for the purposes of FNPOA is the provincial Crown title. Barring arrangements to the contrary, provincial agreement to FNPOA seems necessary. Nonetheless, numerous federal provincial agreements and constitutional documents affect whether this necessity exists and to what extent. The effects of these agreements are set below.

Ontario and the Prairie provinces (Alberta, Saskatchewan and Manitoba) are all subject to the 1924 Ontario Agreement. Therefore, those provinces have underlying title in Reserve Lands, while the federal government has the ability to deal with the land upon a surrender as an agent on behalf of the province. The federal government has the power to sell, lease or otherwise dispose of the provincial underlying title in respect of Reserve Lands that have been surrendered. The analysis of these arrangements leads to the conclusion that a federal-provincial agreement relating to each of these provinces' proprietary interest, if any, be entered into, to confirm the validity of the conveyance of proprietary interest in those lands to create the fee simple and reversionary interest required by FNPOA.

For the Reserves in New Brunswick and Nova Scotia that are set out in the Appendix to the Agreements, the federal Crown has underlying title in those lands. In respect of these lands, the federal Crown has the ability to transfer underlying title to those lands to the First Nations under FNPOA. Moreover, the federal Crown would have the ability to create a reversionary right in Reserve Lands in favour of the Band. However, a waiver of the provinces' right of first refusal would be required. For any Reserves that are not set out in the appendix to the agreements, federal-provincial agreement will be required.

In respect of Reserves in British Columbia, the federal Crown has underlying title in those lands pursuant to Orders in Council 1036 and 2995, each as modified by Order in Council 1555, and Privy Council Order 208. In respect of these lands, the federal Crown has the ability to transfer underlying title to those lands to the First Nations under FNPOA provided that the exceptions and reservations as set out in each of those documents is accepted and reserved from the title conveyed pursuant to FNPOA. If it is not acceptable that the titles be subject to the

exceptions and reservations set out in those documents, a federal-provincial agreement will be required.

Reserves in Quebec are mostly held by the Crown in right of Quebec. The federal Crown only holds title to any individual Reserve if there is an agreement in respect of that Reserve as there are no overarching agreements. Therefore, a federal-provincial agreement is required to apply FNPOA to most Reserves in Quebec. In some cases, however, it may not be required but it will be determinable on a case by case basis.

Reserves in PEI, like Quebec, are mostly held by the provincial Crown. The federal Crown only holds title to any individual Reserve if there is an agreement in respect of that Reserve as there are no overarching agreements. Therefore, a federal-provincial agreement is required to apply FNPOA to most Reserves in PEI. In some cases, however, it may not be required but it will be determinable on a case by case basis.

The situation in Newfoundland is the same as in PEI and Quebec. The federal Crown only holds title to any individual Reserve if there is an agreement in respect of that Reserve as there are no overarching agreements that confer a proprietary interest on the federal Crown. Therefore, a federal-provincial agreement is required to apply FNPOA to most Reserves in Newfoundland. In some cases, however, it may not be required but it will be determinable on a case by case basis.

Finally, the Yukon, Northwest Territories and Nunavut are federal lands. There are no constitutional issues that fetter the Federal Government's power to dispose of or reserve Crown land within these territories.

FIRST NATION LAND TITLE SYSTEMS: LESSONS LEARNED FROM EXPERT PANEL

1. From the experience in the United States, it was statistically demonstrated that First Nation credit markets require familiarity. This supports the proposal for administration harmonization between the proposed First Nation land title system and that of the Provinces.
2. The experience of the Institute of Liberty and Democracy (ILD) illustrated that surveying costs can be reduced through the use of new technology. Moreover, it was demonstrated by the ILD that it is important to conduct surveys as early as possible and use other mechanisms for dispute resolutions at a later date. This could significantly reduce the implementation costs of the proposed First Nation land title system.
3. Experience in Australia suggests that aboriginals in other countries are interested in mechanisms to obtain credit and build equity in their homes. This is an important rationale for the proposed First Nation land title initiative and will be highlighted in associated communications.
4. The ILD demonstrated how important it was to build political support by appealing to the interests of individuals. It was suggested by several experts that this research could be enhanced by demonstrating specifically how the proposed First Nation land title initiative benefits flow to individuals and First Nation governments. This will improve communications and enhance buy-in for the land title project.
5. The experience of the United States with respect to the *Dawes Act* and the implementation of other US federal and tribal legislation demonstrated the importance of jurisdictional clarity and transparency. Credit markets worked better for American tribes where the laws were clear and well understood, with respect to default recourse. This is an important rationale and legislative drafting objective for the proposed First Nation land title initiative.

6. The experience of state jurisdiction and administration with respect to aboriginals is mixed. In the United States, well understood state standards improved credit markets for tribes. In Australia, the states are not administratively supportive of aboriginals and most legislation in support of aboriginals is best implemented on federal territories. This supports the premise of the First Nation land title initiative that a First Nation land title institution is required to implement a First Nation land title system.
7. The experts all advised that the First Nation land title legislation should contain the standards and regulations for First Nation land title, a Torrens land title registry system and surveying. The First Nation law that enables a First Nation to participate in the system should not contain these provisions. This will save implementation costs, lower the costs of doing business with First Nations in the new system, and ensure standards are maintained.
8. Many of the experts advised that the First Nation land title legislative standards for First Nation land title, registry and surveying should be national in scope, but should mimic provincial administrative practices. Reasons provided by the experts for this proposal include: increased First Nation acceptance, ease of use within different provinces, and ability to implement a First Nation system that utilizes current best practices.
9. Some experts suggested that it is important to demonstrate how this initiative will be cost effective and will ultimately be self sufficient. It was suggested that an important communication message should be that the First Nation land title initiative should be considered an infrastructure project to help the First Nation and Canadian economies grow.

(From left) Ms. Nawel Hamidi, Mr. John McKinnery, Mr. Manny Jules and Professor Terry Anderson during the Vancouver Session

(From left to right) Mr. Ken Sckopic, Mr. Graham Matthews, Mr. Wayne Haimila, Mrs. Maria del Carmen Delgado, Dr. André Le Dressay, Mr. Clarence T. (Manny) Jules, Professor Maureen Frances Tehan, Dr. Céline Auclair, Mrs. Diane Cragg, Mr. John McKennirey, Ms. Nawel Hamidi, Professor Dominic Parker and Professor Thomas Flanagan (seated) during the Calgary Session.

(From left to right) Professor Nicholas Olivier, Professor Sakej Youngblood Henderson, Mr. Graham Matthews, Mrs. Diane Cragg, Mr. Wayne Haimila, Mr. Gregory Richard, Dr. André Le Dressay during the Vancouver Session.

(From left) Professor Maureen Tehan, Mrs. Ann Shaw, Mr. Stuart Smith, Mrs. Diane Cragg, Mrs. Maria Antonietta Delgado, Mr. Clarence T. (Manny) Jules, Mrs. Maria del Carmen Delgado, Ms. Sarah Smith, Dr. Céline Auclair, Professor Nicholas Olivier, Ms. Nawel Hamidi, Mr. Graham Matthews, Mr. John McKennirey, Mr. Brent Moreau at the Montréal Session.